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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. _____

BENJAMIN BARRY KRAMER and
RANDY THOMAS LANIER

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI

ALBERT J. KRIEGER
Counsel of Record for
Petitioner Kramer
SUSAN W. VAN DUSEN
KENNETH J. KUKEC
1899 S. Bayshore Dr.
Miami, FL 33133
(305) 854-0050

ROBERT W. RITCHIE
Counsel of Record
for Petitioner
Lanier
DAVID M. ELDRIDGE
606 W. Main Ave.
Knoxville, TN 37902
(615) 637-0661

QUESTION PRESENTED

Whether the petitioners' convictions and mandatory life sentences without parole under 21 U.S.C. Section 848(b) for acting as principal administrators, organizers, or leaders of a "continuing criminal enterprise" consisting of a series of violations of the narcotics laws violate the constitutional prohibition on ex post facto law where the instructions given to the trial jury did not require the jury to find that after the effective date of 21 U.S.C. Section 848(b), October 27, 1986, the petitioners acted as the principal administrators, organizers, or leaders over a continuing series of violations of the narcotics laws.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed in this case:

The United States Government

Benjamin Barry Kramer

Randy Thomas Lanier

Eugene Albert Fischer

Kay Dee Bell, Jr.*

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* Pursuant to Supreme Court 12.4, the petitioners notify the Clerk of Court that they believe that appellant below Kay Dee Bell, Jr., has no interest in the outcome of this petition. Mr. Bell was not charged with a violation of 21 U.S.C. § 848(b).

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Benjamin Barry Kramer and Randy Thomas Lanier respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on

January 30, 1992.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 955 F.2d 479 and is reproduced in the appendix. (App. at 1a - 59a).

SUPREME COURT JURISDICTION

The petitioners' convictions were affirmed by the United States Court of Appeals for the Seventh Circuit on January 30, 1992. Petitioners timely filed petitions for rehearing and suggestions for rehearing en banc which were denied on April 14, 1992. (App. at 60a - 61a).

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. § 1254(1).

LAWS INVOLVED IN THIS CASE

Article One of the United States Constitution, Section 9, Clause 3 provides: "No Bill of Attainder or ex post facto law shall be passed."

The version of 21 U.S.C. Section 848 applicable in this case[1] provided:

Continuing Criminal Enterprise

[Penalties; forfeitures]

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine not to exceed the greater of that unauthorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in Section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life

---

[1] The version of 21 U.S.C. Section 848 applicable to this case became effective on October 27, 1986. Section 848 was amended by the Anti-Drug Abuse Act of 1988, but those amendments do not apply to this case.

imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in Section 853 of this title.

Conditions for life imprisonment for engaging in continuing criminal enterprise

(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with Subsection (a) of this section, if --

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve month period of its existence for the manufacture, importation, or distribution of a substance described in 841(b)(1)(B) of this title.

Continuing Criminal Enterprise Defined

(d)[2] For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter.

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

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[2] Codification. Amendment of this section by section 1253 of Pub.L. 99-570, directing the redesignation of subsecs. (b) and (c) as (d) and (e), respectively, and the addition of a new subsec. (b), resulted in section not containing a subsec. (c). In 1988, Congress again revised Section 848; former subsection (d) is now subsection (c). 21 U.S.C. § 848 (West. 1988).

Suspension of sentence and probation prohibited

(e) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code secs. 24-203 to 24-207) shall not apply until its recent revision in November of 1988.

STATEMENT OF THE CASE

Petitioners Benjamin Barry Kramer and Randy Thomas Lanier were prosecuted and convicted of participating as principal administrators, organizers or leaders of a "continuing criminal enterprise" (CCE) in violation of 21 U.S.C. Section 848(b).[3] That statute became effective on October 27, 1986. The Count of the indictment charging this violation, Count I, alleged that the petitioners had acted as the principal administrators, organizers or leaders of the continuing criminal enterprise "from in or about March 1980, and continuing thereafter up to and including February 1987." (App. at 89a) Pursuant to the mandatory sentencing provision of Section 848(b), the

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[3] The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. Section 3231; the Seventh Circuit Court of Appeals had jurisdiction over petitioners' direct appeal under 28 U.S.C. Section 1291.

petitioners were each sentenced to a term of life imprisonment without possibility of parole.

The evidence presented by the government at trial related to seven transactions, occurring between April 1982 and February 1987, involving the importation and distribution of large amounts of marijuana. Only one of the transactions -- the so-called "San Francisco load" of November 12, 1986 -- occurred after October 27, 1986, the effective date of the statute under which the petitioners were convicted. *United States v. Kramer*, 955 F.2d 479, 482-83 (7th Cir. 1992).

At trial, the petitioners submitted proposed jury instructions on Count I that would have required the jury, in order to convict on that count, to have found that after October 27, 1986, the effective date of 21 U.S.C. Section 848(b),

a defendant functioned as a principal administrator, organizer, or leader of a continuing series of narcotics violations and engaged in a continuing series of narcotics violations. (App. at 77a-88a). The district court refused to give these instructions and instead gave the instructions proffered by the government. (62a-76a). Under those instructions, the jury was first directed to determine whether, during the time period alleged by Count I, a defendant had engaged in a continuing series of felony violations of the narcotics laws as described in 21 U.S.C. Section 848(d). Next, the district court instructed the jury that it had to find two additional elements to convict under 21 U.S.C. Section 848(b):

> First, that a defendant was the principal administrator, organizer, or leader of the continuing criminal enterprise or was one of several such principal administrators, organizers, or leaders of a continuing criminal enterprise that

continued after the effective date of the statute, October 27, 1986;

Second, that after October 27, 1986, a defendant committed a violation of importing marihuana, distributing marihuana or conspiracy [sic] to distribute marihuana as charged which involved at least 30,000 kilograms (66,000 pounds) of marihuana; or that the enterprise in which a defendant was a principal or one of several principal administrators, organizers, or leaders received $10 million in gross receipts between October 27, 1986, and including February 1987, for the importation or distribution of marihuana.

United States v. Kramer, 955 F.2d at 484 (emphasis deleted and added). See also, (App. at 71a-72a).

Based on these instructions, the jury returned a verdict of guilty on Count I of the indictment. On appeal, the Seventh Circuit Court of Appeals affirmed, rejecting the petitioners' argument that the district court's instruction applied 21 U.S.C. Section 848(b) to the petitioners in a manner that violated the constitutional prohibition on ex post facto law. For the reasons that follow, the petitioners

respectfully request that this Court issue a writ of certiorari to the Seventh Circuit Court of Appeals to review that decision.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT'S AFFIRMANCE OF THE PETITIONERS' CONVICTIONS, WHICH WERE BASED UPON PETITIONERS' CONDUCT PRE-DATING THE ENACTMENT OF 21 U.S.C. SECTION 848(b) IN VIOLATION OF THE EX POST FACTO CLAUSE, CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THIS COURT, CONFLICTS DIRECTLY WITH THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IN *UNITED STATES V. TORRES*, 901 F.2d 205 (2d CIR. 1990), *CERT DENIED*, 111 S.CT. 273 (1990) AND PRESENTS SUBSTANTIAL, UNRESOLVED ISSUES OF FEDERAL CONSTITUTIONAL LAW.

A. General Principles Regarding Ex Post Facto Law Derived From This Court's Jurisprudence

Article I of the United States Constitution provides that no "ex post facto law shall be passed." U.S. Const. art. I, section 9, cl. 3.[4] As early as the 18th

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[4] The prohibition on ex post facto law is repeated in Section 10 of Article I, this time as a restraint on the legislative powers of the states. As Justice Miller noted for the Court in *Kring v. Missouri*, 107 U.S. 221, 227 (1883) (overruled on other grounds in *Collins v. Youngblood*, 497 U.S. ____, 110 S.Ct. 2715 (1990)), the repetition of the ex post facto guarantee was meant to signal the importance attached to it by those who attended the Constitutional Convention. Even before that convention,

century, this Court observed that the ex post facto clause requires "some explanation," since without explanation it "is unintelligible, and means nothing." *Calder v. Bull*, 3 Dall. (1 U.S.) 386, 390 (1798). Speaking for the *Calder* Court, Justice Chase explained the different ways in which the ex post facto guarantee could be violated:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to

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concern over ex post facto law occupied the attention of the Constitution's framers, see J. Madison, The Federalist Nos. 44 & 78 (J. Cooke ed. 1961), and the antecedents of the constitutional guarantee can be traced to the common law of England, see 1 Blackstone, Commentaries on the Laws of England 24 (1765).

convict the offender.

Calder v. Bull, 3 Dall. (1 U.S.) at 391; see also *Fletcher v. Peck*, 6 Cranch 137, 138 (1810) (per Marshall, C.J.) ("An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed."); *Cummings v. Missouri*, 4 Wall 277, 325-26 (1867) ("By an ex post facto law is meant one which imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.").

Over the years, Justice Chase's explanation has been distilled into a formula containing two "critical elements" for determining whether a law runs afoul of the ex post facto guarantee: "it must be

retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (footnotes omitted); accord *Miller v. Florida*, 482 U.S. 423, 430 (1987). If one overriding principle has survived over the centuries from the original understanding of the Constitution's framers through the analysis of modern-day courts, it is this: that "[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. _____, 110 S.Ct. 2715, (1990) (citing *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)).

As the above precedents also make clear, the ex post facto prohibition applies not only to penal laws that apply retrospectively on their face, but also to judicial interpretations of facially-valid

penal laws which apply a statute in a retrospective manner. See also, e.g., *Bouie v. Columbia*, 378 U.S. 347 (1964).

B. Statutory Analysis

The version of 21 U.S.C. Section 848(b) that the petitioners were convicted under was enacted as the "Continuing Drug Enterprise Act of 1986", part of the myriad of new narcotics laws included in the "Anti-Drug Abuse Act of 1986", which became law as Pub. L. No. 99-570. Before its revision in 1986, 21 U.S.C. Section 848 set out a single offense titled "continuing criminal enterprise." Under that statute, a person committed a "continuing criminal enterprise" offense if:

> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C § 848(b) (West 1984). Subsection (a) of that statute provided that a person who engaged in such an offense could be fined as well as imprisoned for a period of not less than 10 years up to life.

The 1986 revision to Section 848 created a new category of offense in subsection (b). That subsection provided that a person shall be punished by life imprisonment if the person was "the principal administrator, organizer, or leader" or "one of several such principal administrators, organizers, or leaders" of a continuing criminal enterprise offense and the narcotics violations comprising the continuing criminal enterprise offense

involved at least 300 times the felony quantity of narcotics or resulted in gross receipts within a 12-month period of 10 million dollars or more. 21 U.S.C. § 848(b) (West 1987).

The 1986 version of Section 848 retained the former offense of "continuing criminal enterprise" -- with the same 10 year to life imprisonment, but with increased maximum fines -- as re-lettered subsections (a), (d), and (e) of 21 U.S.C. Section 848.[5] Thus, the 1986 version of Section 848 distinguished between those persons who occupy <u>any</u> position of organizer, supervisor, or manager while engaging in a continuing series of narcotics offenses, and those persons who act as the <u>principal</u> administrators, organizers, or

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[5] The 1986 version of Section 848 did not contain a subsection (c). <u>See</u> Editorial Notes to 21 U.S.C. Section 848 (West 1987).

leaders while engaged in such activity. Only the latter are subject to mandatory life imprisonment without parole.[6]

This new category of criminal offender created by the 1986 version of Section 848 -- the "principal" leader, organizer, or leader (what some might call the supervisors' supervisor or the kingpins' kingpin) -- was unknown to the law prior to October 27, 1986. Before that date, such conduct was without independent legal significance; a person engaged in such conduct was subject to punishment no more harsh than was a lower-level organizer, supervisor, or manager of a continuing series of drug offenses.

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[6] The change from a discretionary maximum sentence of life imprisonment to a mandatory sentence of life imprisonment would itself gives rise to ex post facto concerns, without regard to the new elements created by the 1986 version of Section 848(b). See *Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

C. The Trial Court's Jury Instructions

As set forth above, the instructions given by the district court concerning Count I of the indictment required that tha jury find two additional elements beyond a continuing series of narcotics violations in order to return a guilty verdict. Each of these additional two elements in turn contained two prongs.

The first element could be satisfied if the jury found both prongs in the conjunctive -- that the defendant had been a "principal administrator, organizer, or leader" of a "criminal enterprise," and that the "criminal enterprise" had "continued after the effective date of the statute, October 27, 1986." The second element could be satisfied if the jury found either prong in the disjunctive -- that the defendant had committed one of the charged narcotics violations after October 27, 1986,

or that "the enterprise" itself had received 10 million dollars in gross receipts after that date.

Unlike the instruction proposed by the petitioners, the instruction given by the district court did not require the jury to find that after October 27, 1986, the defendant acted as a principal administrator, organizer or leader over a continuing series of drug offenses as is required by 21 U.S.C. Section 848(b). The court's instructions did not require that the jury find that the defendant function as a principal administrator, organizer, or leader at any time after October 27, 1986. The court's instructions also did not require that the jury find that the defendant acted in that capacity over a "continuing series" of drug offenses occurring after October 27, 1986.

Indeed, the district court's instructions did not require the jury to find that the defendant acted as a principal administrator, organizer, or leader over even a single narcotics transaction after the effective date of Section 848(b). To the contrary, the district court's jury instructions permitted the jury to return a guilty verdict on Count I even if it found that a defendant had neither acted as a principal administrator, organizer, or leader nor engaged in a single narcotics transaction after October 27, 1986.

Under the district court's instructions, the jury could have returned its guilty verdicts if it found merely that the defendant had acted as a principal administrator, organizer, or leader at some time before October 27, 1986, and that "the enterprise" had continued past that date without the defendant any longer functioning

in that role, so long as "the enterprise" grossed $10 million after October 27, 1986.

D. The Analytical Defects in the Seventh Circuit's Affirmance of Petitioners' Convictions

The Seventh Circuit affirmed the petitioners' convictions on Count I of the indictment based on its determination that an 848(b) violation is a "continuing offense" and that "the enterprise" in this case continued "long after" the effective date of the statute, October 27, 1986. *United States v. Kramer*, 955 F.2d at 485. According to the Seventh Circuit, "[i]t is well settled that the ex post facto clause is not applicable to offenses which began before the effective date of a statute and continue thereafter." Id. at 485. The Seventh Circuit, however, did not explain what it meant by the term "the enterprise" or how such an "enterprise" continued past October 27, 1986.

An "enterprise" is not an essential element of an 848(b) offense; nor is the term "enterprise" defined by that statute. Instead, "continuing criminal enterprise" is the descriptive name given to the offense created by 21 U.S.C. Section 848. That offense occurs only if a person engages in a "continuing series" of violations of the federal narcotics laws. The only section of statute in which the term "the enterprise" is used is the section re-written by Congress in 1986, Section 848(b). In that section, the term "enterprise" is used merely as a short-hand form for the "continuing series of violations" element of a Section 848 offense set out in 21 U.S.C. Section 848(d).[7] Thus,

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[7] Unfortunately, as sometimes happens when one session of Congress undertakes to re-write a statute enacted by an earlier session of Congress, the language used in the re-written section lacks the precision of the original. Thus, Section 848(b) speaks of "the enterprise" receiving $10

unlike the federal RICO act, in which an "enterprise" is not only an essential element but an independently-defined entity -- including a group of persons associated in fact for an illegal purpose, see *United States v. Turkette*, 452 U.S. 576, 583 (1981), -- the CCE statute's use of the term "enterprise" is meant to describe the relationship among offenses, not among people.

Because the term "enterprise" has no independent meaning beyond the "continuing series of violations" of the narcotics laws, an "enterprise" can be

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million or more in gross receipts. Since the term "enterprise" in Section 848(b) clearly refers to the continuing series of offenses set out in Section 848(d), "the enterprise" cannot logically have received any receipts. Although a series of violations of the narcotics laws might generate such receipts, only an entity of some kind -- an individual, a group of individuals, or some other type of entity -- could actually receive the receipts thus generated.

deemed to continue past a given date only if a series of offenses occurs after that date.

In this case, the Seventh Circuit reaffirmed its earlier holding that the "continuing series" element of a Section 848 offense can be satisfied by two substantive violations of the federal narcotics laws. *United States v. Kramer*, 955 F.2d at 486 (following *United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir. 1990), *cert denied*, 111 S.Ct. 206 (1990)). Even assuming the accuracy of this holding,[8] the jury

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[8] The Seventh Circuit's holding that the "series" element of a CCE offense can be satisfied by two narcotics felonies (excluding conspiracy offenses), is in conflict with every other federal court to consider the issue, since those courts have construed the "series" element to mean at least three narcotics violations (although most count conspiracy offenses toward that total). See *United States v. Harris*, 959 F.2d 246, 253 (D.C. Cir. 1992) (per curiam); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1571 (9th cir. 1989), *cert denied*, 110 S.Ct. 3237 (1990); *United States v. Hall*, 843 F.2d 408, 411 (10th Cir. 1988); *United States v. Fernandez*, 822 F.2d 382, 385 (3d Cir. 1987),

instruction given by the district court on

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cert denied, 484 U.S. 963 (1987); *United States v. Ricks*, 802 F.2d 731, 737 (4th Cir. 1986), *cert denied*, 479 U.S. 1009 (1986); *United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986), *cert denied*, 480 U.S. 919 (1987); *United States v. Schuster*, 769 F.2d 337, 345 (6th Cir. 1985), *cert denied*, 475 U.S. 1021 (1986); *United States v. Young*, 745 F.2d 733, 751-52 (2d Cir. 1984) *cert denied*, 470 U.S. 1084 (1985); *United States v. Middleton*, 673 F.2d 31, 33 (1st Cir. 1982). The Seventh Circuit's holding in this regard raises the specter that a person could be convicted of an 848(b) offense, and thus sentenced to a mandatory term of life imprisonment, based on a single large-scale transaction involving both an importation and distribution of marijuana. The *Baker* court reached its conclusion that the "series" element of a CCE offense could be satisfied by just two narcotics felonies by analogizing the "series" element to the "pattern" element of RICO offense. *United States v. Baker*, 905 F.2d at 1104. The RICO statute, however, defines a "pattern" as meaning at least two predicate crimes, suggesting that two such predicates are not sufficient in all cases. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). The CCE statute contains no similar limiting language. Nor does the legislative history of the CCE statute contain any limiting gloss on the "series" element similar to the "continuity plus relationship" gloss on the RICO "pattern" element. See *H.J. Inc. v. Northwestern Bell Telephone Co.*, -- U.S. --, 109 S.Ct. 2893 (1989).

Count I of the indictment did not satisfy the "series" requirement, since those instructions did not require the jury to find that at least two narcotics violations constituting a "series" occurred after October 27, 1986. Those instructions required only that the jury find that one such violation occurred after that date or that "the enterprise" have received at least 10 million dollars in gross receipts. Thus, the instructions did not require the jury to find that the petitioners acted as principal administrators, organizers, or leaders of a continuing series of offenses after the effective date of the statute that made such conduct subject to greater punishment.

Moreover, the jury instruction given by the district court did not require the jury to find that a defendant functioned as a "principal administrator, organizer, or leader" after October 27, 1986. The

language of 21 U.S.C. Section 848 makes plain that, to be held liable as a "principal," a defendant must have functioned in this role over a sufficient number of narcotics violations to constitute a "series."[9] The plain language of the district court's jury instructions permitted the jury to find the petitioners guilty on Count I if it found that they had at one time functioned as "principals" and that the "enterprise" continued past Section 848(b)'s effective date, even if the petitioners did not function as principals after that date.

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[9] Section 848(b) punishes only those persons who function as "the principal administrators, organizers, or leaders of the enterprise," meaning the "enterprise" described in Section 848(d). That subsection provides that a "continuing criminal enterprise" is a series of narcotics violations "which are undertaken by such person in concert with five or more other persons with respect to whom such a person occupies a position of organizer, a supervisory position, or any other position of management[.]"

The jury was not required to find that the petitioners acted as principals over even the single narcotics violation that was alleged to have occurred after October 27, 1986, the "San Francisco load" of November 1986. Put another way, the jury instructions required the jury to find that at least one of the narcotics violations over which a petitioner had acted as a "principal" occurred before October 27, 1986, and permitted the jury to find that all of the narcotics violations constituting the series occurred before that date. Yet prior to the effective date of Section 848(b), October 27, 1986, the role of "principal administrator, organizer, or leader" did not even exist.

By permitting the jury to rely on the petitioners' pre-enactment conduct to find that the petitioners had acted as the "principal administrators, organizers, or

leaders" over a series of narcotics violations, the district court's instructions changed the legal consequences of the petitioners' pre-enactment conduct to the petitioners' disadvantage -- precisely what this Court's decisions interpreting the ex post facto clause forbid. *Miller v. Florida*, 482 U.S. at 430; *Weaver v. Graham*, 450 U.S. at 29. Thus, the Seventh Circuit's affirmance of the petitioners' convictions conflicts in principle with the decisions of this Court.

E. The Conflict with the Decision of the Second Circuit Court of Appeals in *United States v. Torres*, 901 F.2d 205 (2d Cir. 1990)

The Seventh Circuit's decision in this case also conflicts directly with the decision of the only other court to consider the ex post facto implications of 21 U.S.C. Section 848(b), the Second Circuit Court of Appeals in *United States v. Torres*, 901 F.2d

205 (2d Cir. 1990).

In *Torres*, the indictment charged that the Torres brothers had been the principal administrators, organizers, or leaders of a continuing criminal enterprise in violation of 21 U.S.C. Section 848(b) which had operated in the New York area from the early 1980's until June 1987. *United States v. Torres*, 901 F.2d at 213, 214. At trial, the government established that the defendants had engaged in at least three narcotics violations occurring after the effective date of Section 848(b). Id. at 229.

The district court in *Torres* instructed the jury that it could find the defendants guilty under Section 848(b) if, in addition to this series of narcotics violations, it found that the defendants had "acted as principal administrators, organizers or leaders of the Organization at

any time between June 24, 1986, and June 23, 1987." Id. at 227 (emphasis deleted). The jury returned a guilty verdict on the Section 848(b) count. The *Torres* court vacated the convictions, finding that the defendants' rights under the ex post facto clause had been violated because the jury had not been required to find that the defendants had functioned as the principal administrators, organizers, or leaders after October 27, 1986. Id. at 229; see also id. at 224, 227.

The district court's jury instructions in this case suffered from the very same constitutional defect identified in *Torres* -- those instructions did not require the jury to find that the petitioner had functioned as "principal administrators, organizers, or leaders" after the effective date of Section 848(b), October 27, 1986. As demonstrated above,

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the district court's instructions in this case permitted the jury to find the defendants guilty on Count I based on a finding that the petitioners had functioned as "principals" before October 27, 1986. Indeed, unlike the instructions given in *Torres*, the district court's instructions in this case did not even require the jury to find that a "series" of drug offenses had occurred after the effective date of Section 848(b).

In this case, the Seventh Circuit attempted to paper over the direct conflict with the Second Circuit in *Torres*.[10] The

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[10] The court below also found itself in disagreement with the *Torres* court's finding that Section 848(b) is a new substantive offense rather than a sentencing-enhancement provision. Compare *United States v. Torres*, 901 F.2d at 240 (". . .[S]ince section 848(b) requires the jury to find, beyond a reasonable doubt, elements in addition to those stated in section 848(a), section 848(b) resulted in a new offense rather than sentence enhancement.") with *United States v. Kramer*, 955 F.2d at 484 ("We do not believe that Section 848(b) is a substantive

Seventh Circuit's attempt to reconcile the cases is contained in a single paragraph of its opinion:

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offense.") and id. at 848 n.4 ("Section 848(b) appears to us to be a sentencing enhancement provision"). The Seventh Circuit decided that it need not reach that issue, however, since Section 848(b) is a "continuing offense." *United States v. Kramer*, 955 F.2d at 484-85. Nevertheless, the question whether Section 848(b) is a new substantive offense is crucial to the issue raised below concerning whether venue had properly been established in the Southern District of Illinois. In its original opinion in this case, the Seventh Circuit found that venue was appropriate in this case, even though the government failed to prove any post-effective date conduct by any of the petitioners in that district, because Section 848(b) was merely a sentencing-enhancement provision. (See App. at) After the petitioners pointed out this inconsistency to the court in their petition for rehearing, the Seventh Circuit amended its opinion to state that venue was appropriate because Section 848(b) is a "continuing offense." See *United States v. Kramer*, 955 F.2d at 486. The Seventh Circuit did not, however, cite any new authority for this proposition, and none of the authorities cited stand for the proposition that venue for a "continuing offense" can be established solely by proof of a defendant's conduct that pre-dates the effective date of the statute under which the defendant was convicted.

Torres, in which Section 848(b) convictions were found to violate the ex post facto clause, is not to the contrary. The instructions in *Torres* allowed the jury to apply Section 848(b) if they [sic] found that the appellants were principal administrators, organizers, or leaders of the organization "sometime during the 12-month period from June 24, 1986 to June 23, 1987." 901 F.2d at 226. The second circuit held that the instruction violated the ex post facto clause, Id. at 227, because the jury was not required to find that the appellants engaged in a continuing offense. The court further held that there could not have been a continuing offense because the jury was not instructed that the appellants had to function a principal administrators, organizers, or leaders of the Torres organization after Section 848(b) became effective. See Id. By contrast, the district court's instruction in this case required the jury to find that the appellant had been the principal administrators, organizers, or leaders of the criminal enterprise that had continued after October 27, 1986, the effective date of Section 848(b). Thus, the instruction required the jury to find that the appellants continued to violate Section 848 after the penalty for violating that statute was increased. The appellants, unlike the defendants in *Torres*, cannot complain that the jury might have found that they stopped acting as principal administrators after Section 848(b) became effective.

United States v. Kramer, 955 F.2d at 485-86 (footnote deleted) (emphasis deleted and

added).

This discussion ignores that it was the petitioners' precise complaint that the jury was not instructed that it had to find that the petitioners acted as the "principals" after the effective date of Section 848(b). It also ignores that the *Torres* court accepted that Section 848(b) is a continuing offense. See, *United States v. Torres*, 901 F.2d at 226. The *Torres* court found an ex post facto violation despite this recognition, because the jury in that case was not instructed that the defendants had functioned as "principals" after the effective date.

In just the same way, the district court instructions in this case did not require the jury to find that the petitioners had acted as "principals" after Section 848(b) took effect. Indeed, the Seventh Circuit's opinion in this case

mirrors the opinion of the district court that the Second Circuit reversed in *Torres*. Compare *United States v. Kramer*, 955 F.2d at 485 (". . . [A]ppellants' ex post facto objections to their convictions must fail because they engaged in a continuing offense.") and id. ("The instruction given by the district court required that the jury find that the appellants engaged in a CCE until after the effective date of Section 848(b).") with *United States v. Torres*, 683 F. Supp. 56, 62 (S.D.N.Y. 1988) ("Since the indictment alleges the continuation of a criminal enterprise beyond the effective date of Section 848(b), the Court denies [the defendants'] motion [to dismiss.]"), rev'd, 901 F.2d at 229.

Consequently, the petitioners respectfully request that this Honorable Court issue a writ of certiorari to the Seventh Circuit Court of Appeals to resolve

this direct conflict on the issue whether 21 U.S.C. Section 848(b) requires proof that a defendant functioned as a "principal administrator, organizer, or leader" over a series of narcotics violations after the statute's effective date, October 27, 1986.

F. The Importance of the Constitutional Issue Presented

Despite Justice Chase's admonition back in 1798 that the ex post facto clause -- because its literal translation means simply that no law should be passed after some fact -- requires "some explanation," *Calder v. Bull*, 3 Dall. (1 U.S.) at 390, this Court has not often expounded on the meaning to be attached to this clause of the Constitution. This Court's precedents, for example, do not explain whether, when Congress passes a new penal statute, every essential element of that new statute must be satisfied by proof of conduct post-dating

the statute, or whether, as the court below appears to have assumed, proof of a single essential element after the effective date of the statute will suffice.[11] Nor has this Court addressed whether some different test should be applied where the new statute creates a "continuing" offense. See *United States v. Baresh*, 790 F.2d 392, 404 (5th Cir. 1986) (addressing enhanced penalties for conspiracy offense); *United States v. Pace*, 898 F.2d 1218, 1238 (7th Cir. 1990), *cert denied* 110 S.Ct. 3286 (1990) (addressing 1988 revision of 21 U.S.C. Section 848); *United States v. Johnson*, 537

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[11] This Court's recent ex post facto cases do not address substantive offenses, focusing instead on procedural issues, see *Collins v. Youngblood*, 497 U.S. -- (1990), 110 S.Ct. 2715 sentencing guidelines, see *Miller v. Florida*, 482 U.S. 423 (1987), sentencing "gain time," *Weaver v. Graham*, 450 U.S. 24 (1981), parole guidelines, *Portley v. Grossman*, 444 U.s. 1311 (1980), and sentencing procedures, see *Dobbert v. Florida*, 432 U.S. 282 (1977).

F.2d 1170, 1175 (4th Cir. 1976) (addressing original version of 21 U.S.C. Section 848).

In addition, this Court's decisions do not explain whether, when Congress amends an existing statute, the ex post facto clause requires that any new element created by the amendment must be established by evidence of a defendant's post-effective date conduct -- as the petitioners argued below, and as seems to be the logical extension of this Court's decisions. See, e.g., *Weaver v. Graham*, 450 U.S. at 29. Furthermore, none of this Court's precedents address directly the argument presented by the petitioners to the court below that the ex post facto clause requires that venue for a new statutory offense be established by evidence of some act within the district after the effective date of the new statute.

Although the likelihood that these

precise issues will arise with respect to the version of 21 U.S.C. Section 848 at issue here decreases in direct proportion with the lapse of time since that version was enacted, identical issues are likely to arise with frequency as Congress goes about its task of enacting new penal statutes and of amending the existing federal criminal laws. Consequently, the petitioners respectfully request that this Court grant the writ to address the substantial, unresolved issues of constitutional law presented by this petition.

CONCLUSION

The jury that returned the petitioners' convictions under 21 U.S.C. Section 848(b) was instructed that it could rely on evidence of the petitioners' pre-effective date conduct to find the essential elements of an 848(b) offense. The Seventh Circuit affirmed the petitioners'

convictions, rejecting the petitioners' argument that their convictions violated the constitutional prohibition on ex post facto law. That decision by the Seventh Circuit conflicts in principle with the decisions of this Court and is in direct conflict with the decision of the Second Circuit Court of Appeals in *United States v. Torres*, 901 F.2d 205 (2d Cir. 1990). In addition, this case presents substantial, unresolved issues of constitutional law.

Consequently, the petitioners respectfully request that this Honorable Court issue a writ of certiorari to the Seventh Circuit Court of Appeals to review that court's decision in this case.

Respectfully submitted,

ALBERT J. KRIEGER, P.A.

ALBERT J. KRIEGER
Counsel of Record for
Petitioner Kramer
SUSAN W. VAN DUSEN
KENNETH J. KUKEC
1899 South Bayshore Drive
Miami, FL 33133
(305) 854-0050

RITCHIE, FELS & DILLARD, P.C.

ROBERT W. RITCHIE
Counsel of Record for
Petitioner Lanier
DAVID M. ELDRIDGE
606 W. Main Avenue
Suite 300
Knoxville, TN 37902
(615) 637-0661

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 88-3444, 88-3445, 88-3446,
89-1025 & 89-2752

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENJAMIN BARRY KRAMER,
RANDY THOMAS LANIER,
EUGENE ALBERT FISCHER, and
KAY DEE BELL, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois.
(No. 87 CR 40070)

(April 20, 1990)

Before CUMMINGS, CUDAHY and KANNE, Circuit Judges. KANNE, Circuit Judge:

Appellant Randy Thomas Lanier was a rising star on the auto-racing circuit in the

early 1980's; indeed, in 1985, he was the rookie of the year at the Indianapolis 500. Lanier apparently did not regard auto racing as a full-time job. Together with appellants Benjamin Barry Kramer, and Eugene Albert Fischer, he directed a vast enterprise which imported several hundred thousand pounds of marijuana into the United States in the 1980's. Appellant Kay Dee Bell, Jr. assisted the enterprise in importing two loads of marijuana.

A jury found Lanier, Kramer, Fischer and Bell guilty to conspiring to distribute marijuana in violation of 21 U.S.C. §§ 846 and 841(a(1). The jury also found that Lanier, Kramer and Fischer had participated as principal administrators, organizers, or leaders of a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848. Finally, the jury found Lanier guilty of conspiring to defraud the

United States under 18 U.S.C. § 371 by impeding the United States in its assessment and collection of revenue.

As required by § 848(b), Lanier, Kramer and Fischer were each sentenced to a mandatory term of life imprisonment without possibility of parole. Pursuant to §§ 846 and 841(a)(1), Lanier and Kramer were sentenced concurrently to forty years imprisonment, Fischer was sentenced concurrently to thirty-five years imprisonment, and Bell was sentenced to twenty-five years imprisonment. Lanier was also sentenced to serve five years for the violation of § 371, to run consecutively to his sentence under §§ 846 and 841(a)(1). In addition, forfeiture judgments were entered against Lanier and Kramer in the amount of $60,000,000 each and against Fischer in the amount of $30,000,000. Appellants raise numerous challenges to

their convictions. We find their arguments unpersuasive and affirm in all respects.[1]

I.

In 1982, Lanier and Kramer formed a partnership which purchased marijuana from sources in Colombia and imported it to the United States through several locations. Kramer arranged to have marijuana brought from Colombia to Florida on his boat, the "Ursa Major," while Lanier provided the initial financing for the purchase of the marijuana and distributed it to his customers upon arrival. The enterprise established by Lanier and Kramer imported two boatloads of marijuana on the "Ursa Major" to Melbourne Beach, Florida from Colombia.

The partnership's first transaction took place in April, 1982 when

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[1] Lanier does not appeal his tax fraud conviction pursuant to 18 U.S.C. § 371.

Lanier and Kramer arranged to bring 15,000 pounds of marijuana from Colombia to Melbourne Beach, Florida. Kramer and Lanier arranged for the load to be picked up in Colombia, unloaded in Melbourne Beach, and then distributed. Lanier purchased boats to ferry the marijuana from the "Ursa Major" to the beach where Kramer coordinated the unloading of the marijuana into waiting vans. A second load of 20,000 pounds of marijuana was imported in the same manner in August, 1982. Some of the marijuana from this load was purchased by a co-conspirator, Conrad Ingold, and was delivered by him to the Staunton, Illinois area.

Fischer joined Lanier and Kramer in orchestrating the next five transactions, in which a tugload and four barge loads of marijuana, were brought into the United States. In the third

transaction, which took place in the Spring of 1983, Lanier, Kramer and Fischer imported 30,000 pounds of marijuana into Bridgeport, Connecticut and arranged its distribution. In the Fall of 1983, they brought a barge load of approximately 14,000 pounds of marijuana to New York. Again, Lanier and Kramer set up its importation and distribution. Some of the marijuana from that load was transported to the St. Louis area for distribution.

In the fifth transaction, which took place in 1984, Lanier, Kramer and Fischer brought a bargeload of 147,000 pounds of marijuana to San Francisco. Bell, who owned Harbor Sand and Gravel Yard, located in San Francisco, assisted the enterprise in unloading the barge and transporting its contents to customers. Bell's tugboat brought the barge, upon its arrival in San Francisco, to his Sand and

Gravel Yard where it was unloaded. Bell also helped Lanier and Kramer arrange the transportation of the marijuana from the Yard. Some of the marijuana imported in the San Francisco load was delivered by customers of Lanier and Kramer to Millstadt, Illinois. Over $50 million was received from the sale of that load of marijuana.

The sixth transaction took place in the Spring of 1985. Lanier, Kramer and Fischer imported a bargeload of approximately 152,000 pounds of marijuana to New Orleans. Kramer was responsible for the purchase of the marijuana in Colombia while Fischer rented dock space in New Orleans and arranged to bring the barge to the dock. Lanier directed the unloading of the barge. Customers of the enterprise shipped some of the marijuana in that load to Millstadt, Illinois.

The seventh transaction occurred in November 1986. The appellants imported a bargeload of approximately 130,000 pounds of marijuana to San Francisco. Kramer sent an agent to Colombia to acquire the marijuana. When the load arrived, Bell arranged for the cover load of lumber to be unloaded from the barge. Fischer provided workers who removed the marijuana from the secret compartments of the barge and placed it in containers which were loaded onto flatbed trailers at Bell's Sand and Gravel yard. Bell also assisted Fischer in loading the containers onto the flatbed trailers. Lanier and Kramer were principally responsible for transporting the marijuana from the Sand and Gravel yard. The enterprise collected $34,795,000 from this load. Kramer received $12,500,000, while Fischer split

$10,253,000 with George Brock.[2] Lanier received the balance of the proceeds.

II.

[1] Lanier, Kramer and Fischer raise two objections to their § 848 convictions based on the premise that § 848(b) is a substantive offense. They argue that their § 848 convictions violated the constitutional prohibition on ex post facto laws.[3] They also argue that their constitutional rights to be tried in the district in which the § 848 offense was

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[2] George Brock (a/k/a "Tom") was indicted with the appellants for engaging in a CCE as a principal administrator, organizer, or leader but did not stand trial because he remained a fugitive from justice.

[3] All citations to and quotations from § 848 hereinafter referred to that statute as applicable here. Section 848 was substantially amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, but those amendments are not pertinent to this opinion.

committed were violated. As we shall explain, both of these objections fail.

First, we consider the appellants' ex post facto objection to their convictions, under § 848, for being the principal administrators of a CCE. Specifically, the appellants object to the district court's instructions on certain elements of § 848.

There are several elements necessary for a conviction under § 848 and other factors which require the application of § 848(b). First, the government must prove that the defendant engaged in a CCE. *See* § 848(d). Under § 848(d) a person is engaged in a CCE if:

> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and (2) such violation is a part of the continuing series of violations of this subchapter or subchapter II of this chapter -- (A) which are undertaken by such person in concert with five or more other persons with respect to whom such persons occupies a position of organizer, a supervisory

position, or any other position of management, and (B) from which such person obtains substantial income or resources.

§ 848(d). Section 848(a) sets forth the penalties for some of the persons who are found to have engaged in a continuing criminal enterprise under § 848(d). Section 848(a) provides that "[a]ny person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment . . . ." Section 848(b), which became effective on October 27, 1986, is titled "Conditions for life imprisonment for engaging in continuing criminal enterprise." It provides for a mandatory life sentence for a person engaging in a CCE if:

> (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and (2)(A) the violation referred to in subsection (d)(1) of this section

involved at least 300 times the quantity of a substance described in subsection 841(B)(1)(B) of this title, or (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million in gross receipts during any twelve month period of its existence for the manufacture, importation or distribution of a substance described in Section 841(b)(1)(B) of this title.

On the application of § 848(b)

the district court instructed the jury

that:

To sustain the charge of being a principal administrator, organizer, or leader of a continuing criminal enterprise as charged in Count I, the government must prove, in addition to the fact that the defendant was engaged in a continuing criminal enterprise, the following propositions:

First, that a defendant was the principal administrator, organizer, or leader of the continuing criminal enterprise or was one of several such principal administrators, organizers, or leaders of a continuing criminal enterprise that continued after the effective date of the statute, October 27, 1986:

Second, that after October 27, 1986, a defendant committed a *violation* of importing marijuana, distributing marijuana or conspiracy to distribute marijuana as charged which involved at least 30,000

kilograms (66,000 pounds) of marijuana[;] or that the enterprise in which a defendant was a principal or one of several principal administrators, organizers, or leaders received $10 million in gross receipts between October 27, 1986, and including February 1987, for the importation or distribution of marijuana.

The district court instructed the jury on the continuing series element of § 848(d) that:

Thus, you must find beyond a reasonable doubt that the defendant is guilty of conspiracy to distribute more than 1,000 pounds of marijuana as charged in Count II and/or that he is guilty of knowingly and intentionally distributing marijuana or importing marijuana as set forth in paragraphs A through R of Count I of the Indictment and that this conduct, together with any additional violations of the drug laws constituted a total of three or more violations of the federal drug laws committed over the period of time charged in Count I with a single or similar purpose. This will constitute a finding that a defendant engaged in a continuing series of violations.

Appellants contend on appeal that § 848(b) is a substantive offense, and is not a sentencing enhancement provision. The government disagrees. The appellants

maintain that if we agree that § 848(b) is a separate substantive offense, their convictions violate the ex post facto clause because the continuing series instruction did not require the jury to find that the appellants engaged in two predicate acts after October 27, 1986, the effective date of § 848(b). They argue that the § 848(b) instruction was also defective because it required the jury to find only after § 848(b) became effective, a defendant committed one violation of importing, distributing, or conspiracy to distribute marijuana or that the enterprise received $10 million in gross receipts from the importation or distribution of marijuana between October 27, 1986, and February, 1987.

The appellants principally rely on *United States v. Torres*, 901 F.2d 205 (2d Cir.), *cert denied*, _____ U.S. _____,

111 S.Ct. 273 (1990) for the proposition that § 848(b) is a substantive offense, and not a sentencing enhancement provision. We do not believe that § 848(b) is a substantive offense. *See United States v. Lowe*, 860 F.2d 1370, 1377 (7th Cir. 1988), *cert denied*, 490 U.S. 1005, 109 S.Ct. 1639 (1989), and *McMillan v. Pennsylvania*, 477 U.S. 79, 91, 106 S.Ct. 2411, 2419 (1986), but we find that we do not need to reach that issue.[4] Assuming, *arguendo*, that §

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[4] Section 848(b) appears to us to be a sentencing enhancement provision under the analysis set forth in *Lowe*. 860 F.2d at 1377. The test set forth in *Lowe* was designed to determine whether Congress intended to create a separate offense or a sentencing enhancement provision. First, the title of § 848(b), "Conditions for Life Imprisonment for Engaging in a Continuing Criminal Enterprise," and the titles of the preceding bills indicate that it is a sentencing enhancement provision. Second, § 848(b) contains an explicit reference to conviction under the predicate provision § 848(d). Third, the penalty contained in § 848(b), while not a multiplier of the penalty for violating § 848(a), merely limits the district court's discretion in sentencing within the range set forth in §

848(b) is a substantive offense, the appellant's ex post facto objections to their convictions must fail because they engaged in a continuing offense.

848(a). Fourth, although § 848(b) does not contain procedures for a separate hearing to determine if the enhancement factors are present, it resembles several other sentencing enhancement statutes, including 21 U.S.C. § 841(b) and 18 U.S.C. § 2113, which do not require a hearing. Indeed, we have recently questioned the need to examine statutes for hearing provisions. In *Lowe*, we held that 18 U.S.C. § 924(e), which does not contain a provision for a separate hearing on the enhancement factors, is a sentencing enhancement provision. Id. at 1378. *See also, United States v. Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989) (§ 841(b) is a sentencing enhancement provision). The Sentencing Guidelines, which took effect on November 1, 1987, clearly contemplate a sentencing hearing under Rule 32 of the Federal Rules of Criminal Procedure for all convictions to determine whether enhancement factors are present. Because of the elaborate procedures established by the Sentencing Guidelines for determining enhancement factors, it is no longer appropriate to examine recently enacted statutes for a hearing requirement to determine whether Congress intended to enact a sentencing enhancement provision coupled with a substantive offense.

It is well settled that the ex post facto clause is not applicable to offenses which began before the effective date of a statute and continue thereafter. *See United States v. Baresh*, 790 F.2d 392, 404 (5th Cir. 1986) ("because conspiracy is a continuing crime, a statute increasing the penalty for a conspiracy beginning before the date of enactment but continuing afterwards does not offend the [ex post facto clause]"); *United States v. Ferrara*, 458 F.2d 868, 874 (2d Cir.), *cert denied*, 408 U.S. 931, 92 S.Ct. 2498 (1972); *United States v. Pace*, 898 F.2d 1218, 1238 (7th Cir.), *cert denied*, ____ U.S. _____, _____ U.S. _____, 110 S.Ct. 3286, 111 S.Ct. 210 (1990); *United States v. Canino*, Nos. 89-1719, 89-1721, 89-1740 & 89-1746, slip op. at 40-41 (7th Cir. Nov. 27, 1991). The appellants argue that a CCE can only become a continuing offense if the government

demonstrates that the defendant engaged in a continuing series of violations after the effective date of § 848(b).

We disagree. In *Pace*, we held that a CCE, like a conspiracy, is a continuing offense. 898 F.2d at 1238. We noted that a CCE and a conspiracy are similar crimes because both punish agreements to commit crimes and both involve continuing conduct. *Id.* *See also* *United States v. Johnson*, 537 F.2d 1170, 1175 (4th Cir. 1976) (holding that the original version of § 848 could be applied to enterprises beginning before its effective date, but which continued thereafter). *Pace* requires that only the government prove that the enterprise continued until after October 27, 1986, the effective date of § 848(b). *Pace*, 898 F.2d at 1238. There is no requirement that the government prove that the appellants

engaged in two predicate acts after the effective date of § 848(b). *See id.*; *Canino*, slip op. at 41 (holding that the government need not prove the defendant's involvement in a conspiracy after the effective date of an enhanced penalty provision). The instruction given by the district court required that the jury find that the appellants engaged in a CCE until after the effective date of § 848(b). The evidence was sufficient to show that the appellants engaged in a CCE from 1980 until February 1987, long after the effective date of § 848(b). Thus, we hold that the appellants engaged in a continuing offense.

Torres, in which § 848(b) convictions were found to violate the ex post facto clause, is not to the contrary. The instructions in *Torres* allowed the jury to apply § 848(b) if they found that the appellants were principal administrators,

organizers, or leaders of the organization "sometime during the 12 month period from June 24, 1986 to June 23, 1987." 901 F.2d at 226. The second circuit held that the instruction violated the ex post facto clause, *id.* at 227, because the jury was not required to find that the appellants engaged in a continuing offense. The court further held that there could not have been a continuing offense because the jury was not instructed that the appellants had to function as principal administrators, organizers, or leaders of the *Torres* organization after § 848(b) became effective. *See id.* By contrast, the district court's instruction in this case required the jury to find that the appellants had been the principal administrators, organizers, or leaders of a criminal enterprise that had continued after October 27, 1986, the effective date

of § 848(b). Thus, the instruction required the jury to find that the appellants continued to violate § 848 after the penalty for violating that statute was increased. The appellants, unlike the defendants in *Torres*, cannot complain that the jury might have found that they stopped acting as principal administrators after § 848(b) became effective.[5]

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[5] The appellants argue in their reply briefs that if § 848(b) was a substantive offense it was plain error for the district court to fail to instruct the jury that it could find the appellants guilty of violating § 848(a). The appellants' theory is that if the jury was required to determine whether the appellants met the requirements for a life sentence under § 848(b), it should have been able to decide that the appellants have violated only § 848(a). At the instruction conference, the district court asked the appellants whether they wanted the jury to be instructed that it could find the appellants had violated only § 848(a) in addition to the instruction on § 848(b). Kramer and Lanier expressly stated that they did not want a lesser included offense instruction on § 848(a), while Fischer remained silent. Therefore, the appellants have waived this issue.

The appellants also claim that venue did not lie in the Southern District of Illinois for the offense of violating § 848. *See* U.S. Const. amend VI; Fed. R. Crim. P. 18. The appellants argue that because none of the predicate acts occurred in the Southern District of Illinois after the effective date of § 848(b), they were convicted in violation of their right to be tried in a district in which their crimes were committed. Because the appellants engaged in a continuing offense,* venue may be established by proof that any act in furtherance of the CCE took place in the Southern District of Illinois. *See United States v. Molt*, 772 F.2d 366, 369-70 (7th Cir. 1985), *cert denied*, 475 U.S. 1081, 106

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* The Court's original opinion read: "Since § 848(b) is a sentencing enhancement provision, . . ." The Court amended its opinion in its order denying appellants petitions for rehearing and suggestions for rehearing en banc. See (App. at 60a-61a).

S.Ct. 1458 (1986); *United States v. Lewis*, 797 F.2d 358, 366-68 (7th Cir. 1986), *cert denied*, 479 U.S. 1093, 107 S.Ct. 1308 (1986). At trial the government offered testimony to show that the appellants provided large quantities of marijuana to their dealers in East St. Louis and Southern Illinois areas. Indeed, the appellants do not contest the adequacy of this evidence on appeal. The evidence was more than adequate to establish venue.

III.

Lanier, Kramer and Fischer raise several other objections to their § 848 convictions. They first argue that the district court's instructions erroneously permitted the jury to rely upon the conspiracy charge as one of the continuing series of violations that § 848 requires for conviction. In *United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir. 1990), *certs*

denied, _____ U.S. _____, _____ U.S. _____, _____ U.S. _____, 111 S.Ct. 206, 111 S.Ct. 270, 111 S.Ct. 686 (1990), we held that a conspiracy may not be included as one of the crimes making up the continuing series necessary for a CCE conviction. We also held, however, that "a series may be established by two or more substantive drug offenses." *Id.* at 1104. *Baker* obligates us to affirm the convictions of the appellants because the indictment alleged that each appellant was involved in more than two substantive drug offenses. The indictment charged Lanier and Kramer with involvement in seven substantive drug offenses, while Fischer was charged with five substantive offenses. These offenses were more than adequate to meet the continuing series requirement of the CCE charge.

Lanier, Kramer, and Fischer contend that the jury should have been instructed that it must unanimously agree as to each of the two or more predicate offenses constituting the "continuing series" element of the charge. Federal Rule of Criminal Procedure 31 requires, and the district court gave, a general unanimity instruction. *See* Fed.R.Crim.Pro. 31. The appellants principally rely on *United States v. Echeverri*, 854 F.2d 638, 642-43 (3d Cir. 1988), which held that, in a § 848 case, the jury should be instructed that it must unanimously agree on the acts which constitute the continuing series of violations. This Court has expressly declined to follow *Echeverri*. In *Canino*, slip op. at 34, we held that "[t]he constitutional requirement of juror unanimity in federal criminal offenses is satisfied when each juror in a CCE trial is

convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed two predicate offenses." *See also United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), *cert denied*, 475 U.S. 1018, 106 S.Ct. 1202 (1986) (holding that under § 848 the jury was not required "to agree unanimously on the identity of at least five people who acted under [a defendant's] supervision"); *United States v. Bond*, 847 F.2d 1233, 1237 (7th Cir. 1988). The general unanimity instruction required the jury to find that the appellants committed at least *three* predicate acts. Thus, the appellants' unanimity argument is unavailing.

Lanier, Kramer and Fischer argue that the district court's instructions on the CCE count constructively amended the indictment. The court instructed the jury that it could find that the appellants

engaged in a continuing series of violations based upon the various predicate acts set forth in the indictment, "*together with any additional violations of the drug laws*" (emphasis added). The appellants object to the italicized portion of the instruction on the ground that it subjected them to further controlled substance violations beyond those which were charged in the indictment. *See Stirone v. United States*, 361 U.S. 212, 215-18, 80 S.Ct. 270, 272-74 (1960). The Supreme Court has long held that every defendant has a "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *United States v. Miller*, 471 U.S. 130, 140, 105 S.Ct. 1811, 1817 (1985) (quoting *Stirone*, 361 U.S. at 217, 80 S.Ct. at 273). A constructive amendment of an indictment occurs when the evidence introduced by the prosecution broadens "the

possible bases for conviction from that which appeared in the indictment." *Miller*, 471 U.S. at 138, 105 S.Ct. at 1816. A constructive amendment of the indictment may also occur if the district court's instructions to the jury broaden "the possible bases for conviction." *Id.*; *United States v. Keller*, 916 F.2d 628, 632-36 (11th Cir. 1990), *cert denied*, _____ U.S. _____ 111 S.Ct. 1628 (1991). It is well settled that "[a] judicial amendment of the indictment, whether implicit or explicit, is *per se* reversible error." *United States v. Galiffa*, 734 F.2d 306, 311 (7th Cir. 1984); *United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985).

The appellants contend that the trial court's instructions broadened the possible bases for their CCE convictions by including new predicate acts which were not listed in the indictment. They contend

that it is possible that the jury found the appellants were principal leaders or administrators of a CCE based on the new predicate acts that were not alleged in the indictment.

We disagree with the appellants' contention that the trial court's instruction broadened "the possible bases for conviction from that which appeared in the indictment," *Miller*, 471 U.S. at 138, 105 S.Ct. at 1816 (1985), because the appellants misinterpret the requirements for a conviction under § 848. Numerous courts, including this one, have allowed proof of overt acts in violation of the drug laws, although those acts were not specified in the indictment, to sustain a § 848 charge. In *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), *cert denied*, 420 U.S. 962, 95 S.Ct. 1351, 421 U.S. 949, 95 S.Ct. 1682 (1975), the court

stated that an indictment charging a violation of § 848 need not "specify each violation constituting the continuing series of violations proscribed by the statute." *See also, United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984), *cert denied*, 470 U.S. 1084, 105 S.Ct. 1842 (1985) ("in order to support a § 848 charge, the government is not required to plead in any form, much less obtain convictions on, any of the eligible predicate offenses, but may instead simply prove at trial the continuing series of offenses."); *Baker*, 905 F.2d at 1103 (same); *Markowski*, 772 F.2d 358, 361-62 (same); *United States v. Alvarez- Morreno*, 874 F.2d 1402, 1408 (11th Cir. 1989), *cert denied*, _____ U.S. _____, 110 S.Ct. 1484 (1990); *United States v. Sterling*, 742 F.2d 521, 526 (9th Cir. 1984), *cert denied*, 471 U.S. 1099, 105 S.Ct. 2322 (1985);

Echeverri, 854 F.2d at 642 n. 4; *United States v. Becton*, 751 F.2d 250, 256 (8th Cir. 1984), *cert denied*, 472 U.S. 1018, 105 S.Ct. 3480 (1985).

The appellants contend that *Young*, *Sperling* and *Baker* are distinguishable because those cases did not involve an amendment of the indictment. We disagree. If the government was not required to allege any of the possible predicate acts in the indictment, there can be no error where it alleged all but a few of the acts. Moreover, we note that the appellants do not contend that they were in fact unable to defend against the CCE charge because they were not notified of the predicate acts that the government would seek to prove at trial. Thus, we do not agree that the indictment was constructively amended by the court's instructions. *See Canino*, slip op. at 26

(holding that there was no amendment of the indictment where the jury was instructed that it could rely on a predicate act not mentioned in the indictment to find a continuing series under § 848(d)).

Lanier, Kramer and Fischer argue that punishment marijuana trafficking under § 848(b) with life imprisonment without possibility of parole is cruel and unusual punishment in violation of the eighth amendment. A recent decision by the Supreme Court, *Harmelin v. Michigan*, ____ U.S. ____, 111 S.Ct. 2680 (1991), has settled this issue definitively. In *Harmelin*, the petitioner was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole. *Id.* at 2654. The Supreme Court rejected the petitioner's argument that the sentence was cruel and unusual within the meaning of the

eighth amendment. *Id.* at 2702. The Supreme Court also rejected the petitioner's claims that his sentence was disproportionate to the crime he committed and that the sentence was void because the court was required to impose it and could not consider mitigating factors. The Court stated that: "[w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further." *Id.* Thus, we find meritless the appellants' claim that their mandatory life sentences violate the eighth amendment.

IV.

Lanier, Kramer, Fischer and Bell argue that the trial court's instructions to the jury after it began its deliberations and indicated that it was deadlocked improperly coerced the jury to return a guilty verdict. The trial lasted

fourteen weeks. After being instructed, the jury began its first day of deliberations at 3:00 p.m. and recessed at 10:05 p.m. On the second day of its deliberations, the jury requested to hear certain portions of the trial testimony. Before the district court could respond to this request, the foreman sent another note stating that though the jury was "still deliberating over the first defendant" it was "at a point of deadlock." The court then read the requested testimony to the jurors. A later note from the jury asked whether "defendants Lanier, Kramer and Fischer [could] be convicted on the original indictment of 848(a) only and not on 848(b)." Before the jury retired, the court instructed that the jurors "must follow the instructions I have previously given with regard to the superseding indictment filed January 26, 1988, only."

On the third day of deliberations, the jury sent a note to the court which stated: ". . . Regarding defendant Bell, Count 2, we're deadlocked eleven to one. Regarding defendants Lanier and Kramer, Count 1, we are deadlocked eleven to one. Regarding defendant Fisher [sic], Count 1, we have not taken a final vote." A short time later, the jury informed the court that: ". . . We have taken -- taken the final vote on Fisher [sic], Count 1. It is the same as the others, deadlocked, eleven guilty, one not guilty. If you wish further deliberations, we respectfully request that it begin at 9 a.m. tomorrow . . . ." The district court responded to the note by directing that deliberations would resume the next morning.

On the fourth day of deliberations, the jury announced that: ".

. . we are still deadlocked on Count 1 for defendants Lanier, Kramer and Fisher [sic]. Eleven guilty [and] one not guilty. Also, on Defendant Bell, Count 2, eleven guilty and one not guilty . . . . Any further deliberations would be to no end. . . ."

The appellants then moved for a mistrial. During the court's discussion of the note with counsel, the foreman sent another note requesting that the court give him "two more hours." The district court denied the motions for a mistrial and sent a note to the jury which stated: "Continue your deliberations. Judge Foreman."

In denying the motions for mistrial the district court found that although the jury had been in session over the course of four days, it had spent as little as nine hours over five days actually deliberating. The court noted that the jurors often were required to wait

while counsel for the government and the appellants debated the proper responses to the jury's notes.

Soon afterwards, the jury responded with a note which stated: "Your Honor, we are at a deadlock. Nothing has changed. Thank you. . . ." Appellants once again moved for a mistrial. The district court denied the motions and directed the jury to continue its deliberations. The court found that the jury had not deliberated for an adequate time in relation to the length of the trial for the court to grant a mistrial. On the fifth day of deliberations, the jury returned guilty verdicts against the appellants on all counts.

The appellants maintain that the trial judge's instruction to the jury to "continue to deliberate" violated the rule of *United States v. Silvern*, 484 F.2d 879,

883 (7th Cir. 1973). The relevant inquiry, under *Silvern*, however, is "whether 'the court's communications pressured the jury to surrender their honest opinions for the mere purpose of returning a verdict.'" *United States v. Thibodeaux*, 758 F.2d 199, 203 (7th Cir. 1985) (quoting *United States v. Hamann*, 688 F.2d 507, 511 (7th Cir. 1982), *cert denied*, 460 U.S. 1013, 103 S.Ct. 1255 (1983)). On several occasions this court has held that instructions to continue to deliberate were neutral and not coercive. In *United States v. D'Antonio*, 801 F.2d 979, 983-84 (7th Cir. 1986), we said that an instruction to "continue to deliberate" after the jury had declared that it had reached in impasse is "perfectly content neutral and carrie[s] no plausible potential for coercing the 'jury to surrender their honest opinions for the mere purpose of returning a verdict.'" *Id.*

at 984 (quoting *Thibodeaux*, 758 F.2d at 203). Moreover, in *Thibodeaux*, the jury notified the court that it had reached a verdict on three counts but was deadlocked on one count. The court instructed the jury to continue deliberations for the time being, but informed the jurors that it would call them out later. *See id.* This court found that the instruction was "noncommittal" and not coercive. *See United States v. Splendorio*, 830 F.2d 1382 (7th Cir. 1987), *cert denied*, 484 U.S. 1068, 108 S.Ct. 1034 (1988) (upholding an instruction that differed from that of *Silvern* where early in the deliberations one juror stated that he believed the evidence insufficient to convict any defendant on any count).

The appellants claim that this case is different from *D'Antonio* and *Thibodeaux* because the district court knew

that there was one holdout juror when it instructed the jury to continue its deliberations. We are unable to see how that makes any difference; the instruction simply did not influence the jurors to find the appellants guilty or not guilty. Indeed, the holdout juror remained free to persuade the other jurors to acquit the appellants. *See United States v. Warren*, 594 F.2d 1046, 1049-50 (5th Cir. 1979) (holding that the trial judge did not err when he instructed the jury to continue its deliberations even though he was aware of a divided preliminary vote by the jurors); *United States v. Robinson*, 560 F.2d 507, 516-18 (2d Cir. 1977), *cert denied*, 435 U.S. 905, 98 S.Ct. 1451 (1978). Thus, we conclude that the trial judge's instructions to the jury to "continue your deliberations" were entirely proper and not in error.

The appellants further argue that the district court erred when it twice declined to declare a mistrial after the jury announced that it was "deadlocked." "The decision to grant a mistrial is within the broad discretion of the trial judge and is to be made in view of all the circumstances of the case." *United States v. Allen*, 797 F.2d 1395, 1400 (7th Cir.), *cert denied*, 479 U.S. 856, 107 S.Ct. 196 (1986); *D'Antonio*, 801 F.2d at 983. In denying the motions for a mistrial the district court found that the jury had deliberated for a very short time, perhaps as little as nine hours over four days, in comparison to the length of the trial, fourteen weeks, and that it was not hopelessly deadlocked. *See id.* (finding no abuse of discretion where the trial court denied a motion for a mistrial and instructed the jury to continue its

deliberations where it reasonably believed that the jury had not devoted adequate time to its deliberations). The district court's determination that the jury was not hopelessly deadlocked after only four days was certainly reasonable given the extensive length of the trial and the multiple defendants involved. There was no abuse of discretion in the district court's refusal to grant a mistrial.

V.

Fischer argues that the district court erred under Federal Rule of Evidence 403 in admitting testimony by an informant, C.M. Stewart, that Fischer imported 15 tons of marijuana to the United States in 1981. Fischer was not charged with any criminal offense as a result of that activity. The trial court overruled Fischer's objection and concluded that the evidence was admissible to show that Fischer intended to

import marijuana on other occasions. Fischer contends that the government improperly introduced the evidence to show that Fischer had a propensity for committing drug offenses. Fischer also argues that the admission of this testimony was especially prejudicial to him because of the danger that the jury would erroneously consider the evidence in the context of the continuing series requirement of § 848.

To determine whether evidence of other crimes, wrongs, or acts is admissible under Rule 404(b) of the Federal Rules of Evidence we follow the three part analysis set forth in *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496 (1988). *Jackson v. United States*, 886 F.2d 838, 845 (7th Cir. 1989); *United States v. Lennartz*, No. 90-1770, slip op. at 5-6 (7th Cir. Nov. 21, 1991). First, the district court must

determine whether the evidence of other crimes, wrongs, or acts "is probative of a material issue other than character." *Id.* We have found inadmissible evidence used to show a defendant's bad character through a mere propensity to commit other crimes. *Id; United States v. Shackleford*, 738 F.2d 776, 779 (7th Cir. 1984). Second, the district court must determine "whether the evidence of other crimes, wrongs, or acts is relevant under Rule 402 -- as enforced through Rule 104(b)." *Jackson*, 886 F.2d at 846; *Huddleston*, 485 U.S. at 691, 108 S.Ct. at 1501-02. The evidence is relevant only if "the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston*, 485 U.S. at 689, 108 S.Ct. at 1501; *Jackson*, 886 F.2d at 846. Relevance, in part, depends on whether the other crime, wrong, or act is similar enough and close enough in time to

a matter in issue. *Shackleford*, 738 F.2d at 779.

We noted in *Jackson* that if the evidence of other crimes, wrongs or acts is "relevant and offered for a proper purpose under 404(b), 'the evidence is subject only to general strictures limiting admissibility such as . . . [Rule] 403.'" *Id.* at 846-47 (quoting *Huddleston*, 485 U.S. at 687, 108 S.Ct. at 1500). We held in *Jackson* that the key factor in the Rule 403 balancing test "is plainly that relevant evidence should only be excluded if its probative value is *substantially* outweighed by any of the listed concerns in Rule 403." 886 F.2d at 847; *Shackleford*, 738 F.2d at 779; *United States v. Manganellis*, 864 F.2d 528, 531-32 (7th Cir. 1988). "In reviewing the admissibility of relevant, potentially prejudicial evidence, we view the evidence in the light most favorable to its

proponent, maximizing its probative value and minimizing the prejudicial effect." *United States v. Brown*, 688 F.2d 1112, 1117 (7th CIr. 1982); *United States v. Connelly*, 874 F.2d 412, 415 (7th Cir. 1989).

In reviewing decisions to admit evidence, the district court's "[d]iscretion, when exercised, will rarely be disturbed. . . ." *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir. 1987). We will reverse a trial court's admission of evidence under 403 or 404(b) "'only upon a showing of abuse of discretion.'" *United States v. Chaimson*, 760 F.2d 798, 808 (7th Cir. 1985) (quoting *Brown*, 688 F.2d at 1117 (7th Cir. 1982); *United States v. Zapata*, 871 F.2d 616, 621 (7th Cir. 1989); *United States v. Liefer*, 778 F.2d 1236, 1244 (7th Cir. 1985). We note finally, that "[o]ur role on review is not to second-guess the results reached by

the trial court in applying the *Shackleford* standards." *United States v. Hudson*, 843 F.2d 1062, 1065 (7th Cir. 1988).

We believe that there was an exercise of principled discretion by the district court. The district court admitted Stewart's testimony concerning Fischer's shrimp boat shipment of marijuana on the ground that it showed that Fischer intended to conspire with the other appellants to distribute more than 1,000 pounds of marijuana. *See Liefer*, 778 F.2d at 1242-43 (the defendant's specific intent to distribute was an essential element of the crime of conspiracy to distribute more than 1,000 pounds of marijuana). This satisfied the first part of the *Huddleston* analysis. Moreover, the district court did not abuse its discretion in concluding that Fischer's 1981 importation of marijuana was similar enough to the activities for which

he was on trial -- conspiracy to distribute in excess of 1,000 pounds of marijuana -- and close enough in time -- 1981 as opposed to 1983-87 -- to be relevant evidence. The evidence was more than adequate to show that Fischer directed the importation of the 15 tons of marijuana on the shrimp boat, thus satisfying the second part of the *Huddleston* analysis. *See* 485 U.S. at 689, 108 S.Ct. at 1499. Third, the district court did not abuse its discretion in concluding that the prejudicial effect of Stewart's testimony, if any, did not substantially outweigh its probative value. The district court did not abuse its discretion in admitting Stewart's testimony concerning Fischer's importation of 15 tons of marijuana in 1981.

Bell contends that the district court abused its discretion in denying Bell's motion to admit in evidence certain

portions of the proffered testimony of William Palumbo. Bell contends that the government stipulated that Bell could introduce Palumbo's testimony. Palumbo was a front man for the enterprise, who helped reserve dock space in San Francisco and New Orleans. Before trial, Palumbo, a co-defendant of Lanier, Fischer, Kramer and Bell, agreed to give a proffer of his testimony to the government apparently because he wanted to demonstrate to the government that he would be a cooperative witness. Davis, an FBI agent who took the proffer from Palumbo, testified that Palumbo "told me that Kay Bell was unaware of any illegalities." At a pretrial hearing on whether Palumbo's trial should be severed from that of the other defendants, counsel for the government stated that "I'll stipulate that statement that was made by Mr. Palumbo . . . in Mr.

Bell's behalf can be introduced for Mr. Bell." The government made the offer to stipulate because it hoped to prevent the severance of Palumbo's trial from that of the other appellants. Counsel for Bell, who had not previously participated in the discussion, responded: "We will accept that stipulation, Your Honor." The district court stated "okay." The hearing concluded without further discussion of the stipulation. Shortly after the hearing, Palumbo's motion for a separate trial was granted.

During the trial, when Bell moved for the admission of the stipulation, the government opposed the admission of Palumbo's testimony. Although the record is not entirely clear, it appears that the district court concluded that the government had entered into a stipulation with counsel for Bell. The district court,

however, noted that the government's offer to stipulate had been made with the assumption that Palumbo was to be tried with the other defendants. The district court denied Bell's motion to require enforcement of the government's stipulation because Palumbo was no longer a co-defendant.

We agree with the district court that the government did initially stipulate to the admission of the testimony of Palumbo, which was helpful to Bell. Even so we cannot find that the district court abused its discretion when it declined to enforce the stipulation. "As with other matters of trial management, the district court has 'broad discretion' to decide whether to hold a party to its stipulations; the district court's decision will be overturned on appeal only where the court has clearly and unmistakably abused

its discretion." *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989); *Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 690-91 (7th Cir. 1985). Here, the government stipulated with the assumption that Palumbo would be tried with the appellants. The circumstances underlying the offer to stipulate were altered when the district court granted the motion to sever Palumbo's trial. The district court acted within its discretion to void the stipulation.

Bell also argues that the trial court abused its discretion in not enforcing the stipulation because the stipulated testimony tended to exculpate him by contradicting proof which tended to show that Bell understood that the other appellants were engaged in a conspiracy to import marijuana. The government points out in response that Palumbo's statement

was not subject to cross-examination and that the other evidence of Bell's guilt was substantial. We agree and conclude that the admission of the stipulation, while possibly helpful to Bell, would not have made a difference in the outcome of the trial. Therefore, we conclude that the district court did not abuse its discretion in denying Bell's motion to enforce the stipulation.

VI.

The other arguments raised by appellants are without merit.

For the foregoing reasons, we AFFIRM the convictions of Lanier, Kramer, Fischer and Bell.

CUDAHY, Circuit Judge, concurring. I agree that the law of this circuit supports the affirmance of these convictions. I write separately to discuss this circuit's law on

an issue touched on only tangentially in the opinion for the panel: the admissibility of other crimes evidence on the issue of intent when intent is not disputed. Fischer's intent was apparently in issue in this case, so I agree that evidence of his 1981 marijuana importation activities was admissible. However, since the government has argued that Fischer's intent was "necessary in issue" because Fischer was charged with a specific intent crime, Gov't Br. at 110, I think it appropriate to express my concerns regarding this circuit's rule on this matter.

The general rule throughout the circuits has been that in order for evidence of other crimes to be admissible to establish intent under Federal Rules of Evidence 404(b), the issue of intent must be disputed. *See United States v. James,*

555 F.2d 992, 1000 n. 46 (D.C.Cir. 1977) (citing cases from the Second, Third, Fourth, Fifth, Sixth, Eighth and D.C. Circuits); *United States v. Fierson*, 419 F.2d 1020, 1023 (7th Cir. 1969); Edward W. Cleary, *McCormick on Evidence* § 190, at 564 (3d ed. 1984) ("[I]f the prosecution maintains that the other crime reveals defendant's guilty state of mind, then his intent must be disputed."); 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* 4,6 5242, at 489 (1978) ("The issue of intent must be seriously disputed; for example, if the defendant claims that he is not the person identified as the actor, intent is not an issue and the [Rule 404(b)] exception cannot be invoked.").

This circuit has carved out an exception to the general rule, holding that where the crime includes specific intent as

an element, other-crimes evidence is admissible even though intent is not in dispute (or, put another way, intent is "automatically in issue."). *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir.), *cert denied*, 490 U.S. 1075 (1989); *United States v. Liefer*, 778 F.2d 1236, 1242-43 (7th Cir. 1985). The line of cases applying this exception extends back to *United States v. Weidman*, 572 F.2d 1199, 1202 (7th Cir.), *cert denied*, 439 U.S. 821 (1978). Other circuits generally have declined to follow suit with such an exception.[1] Most courts make no distinction between specific intent and general intent crimes, but simply apply the

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1 Some cases in the Eighth Circuit have also held that intent need not be disputed by the defendant in specific intent crime cases in order for other crimes evidence to be admissible. *See United States v. Engleman*, 648 F.2d 473, 478 (8th Cir. 1981); *United States v. Adcock*, 558 F.2d 397, 402 (8th Cir.), *cert denied*, 434 U.S. 921 (1977).

general rule that intent must be in issue for other crimes evidence to be admitted.[2] As the Fifth Circuit has written: "If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded." United States v. Beechum, 582

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[2] The Fifth Circuit has expressly rejected a distinction between specific intent and general intent crimes as "unhelpful in analyzing when such evidence properly bears on intent." *United States v. Adderly*, 529 F.2d 1178, 1180 (5th Cir. 1976).

Some courts have held that the defendant bears the burden of affirmatively removing the issue of intent form the case, generally by stipulation or concession. *See, e.g. United States v. Manner*, 887 F.2d 317, 322 & n.2 (D.C. Cir. 1989), *cert denied*, 493 U.S. 1062 (1990); *United States v. Russo*, 717 F.2d 545, 552 (11th Cir. 1983). In contrast to the approach of these cases, the specific intent exception of this circuit automatically precludes defendants charged with specific intent crimes from ever removing intent as an issue in the case, even by stipulation.

F.2d 898, 914 (5th Cir. 1978) (en banc), cert denied, 440 U.S. 920 (1979) (emphasis added; footnote omitted); *see also, United States v. Figueroa*, 618 F.2d at 934, 940 (2d Cir. 1980).

In questioning the defensibility of this circuit's rule, I wrote in *United States v. Chaimson*, 760 F.2d 798, 813 (7th Cir. 1985):

> [T]he rule should not be so understood as to make the admissibility of other crimes evidence automatic where the crime is one of specific intent. Even if we adopt the fiction that intent is always in question in such cases, such evidence is only admissible if it is really introduced to show intent. The government . . . cannot simply flood the courtroom with other crimes evidence on the grounds that the crime was one of specific intent.

I am afraid that over the years this circuit's bright line exception has resulted in a great deal of prejudicial extrinsic evidence finding its way into many criminal trials. In my view, intent ought to be an issue *in dispute* in order

for evidence of other crimes to be admissible for the purpose of establishing intent; when intent is not contested, evidence of other crimes is likely to be used simply for the prohibited purpose of showing criminal propensity. But the mere fact that a crime includes specific intent as an element does not make the issue of intent disputed. Rather, our specific intent exception has effectively swallowed the rule providing that, as evidence of intent, other crimes are not admissible unless intent is disputed or called into question. I believe that we should return to that fundamental rule.

A true Copy:
Teste:

_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-3444, 88-3445, 88-3446,
89-1025 & 89-2752

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN BARRY KRAMER, RANDY THOMAS LANIER, EUGENE ALBERT FISCHER, and KAY DEE BELL, JR.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois,
Benton Division

ON PETITION FOR REHEARING

(April 14, 1992)

Before FOREMAN, Chief Judge, and CUMMINGS, CUDAHY, and KANNE, Circuit Judges.

The slip opinion issued in the above-entitled cause on January 30, 1992, is further amended as follows:

The first paragraph on page 11, line 8, delete the words "Since § 848(b) is

a sentencing enhancement provision, " and replace them with "Because the appellants engaged in a continuing offense,".

Further, on consideration of the petitions for rehearing and suggestions for rehearing en banc filed in the above-entitled cause and of the answer thereto, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

GOVERNMENT'S SUGGESTED JURY
INSTRUCTION NO. 20
Second Amended

To sustain the charge of being a principal administrator, organizer, or leader of a continuing criminal enterprise as charged in Count I, you must first determine whether or not a defendant is engaged in a continuing criminal enterprise.

To sustain the charge of engaging in a continuing criminal enterprise, the government must prove the following propositions:

First, that the defendant violated Title 21, United States Code, Section 846 as charged in Count II (conspiracy to distribute in excess of 1,000 pounds of marihuana, or committed other violations of Title 21, United States Code, Section 952 (importation of marihuana) or Title 21, United States Code, Section 841(a)(1) (distribution of marihuana) as those offenses have been defined for you; and

Second, that the commission of at least one of those offenses occurred within the statute of limitation, that is on or after November 25, 1982, and was part of a

continuing series of violations of the federal controlled substances act by the defendant as hereafter defined; and

Third, that the defendant undertook to commit such a series of offenses in concert with five or more other persons either named or unnamed in the indictment; and

Fourth, that the defendant occupied a position of organizer, a supervisory position or other position of management with respect to such five or more other persons; and

Fifth, the defendant obtained substantial income or resources from said continuing series of such violations.

I will now discuss in more detail and define for you the meaning of certain terms used in the statute and in these instructions relating to the five elements of the so-called "continuing criminal enterprise."

The first element of a continuing criminal enterprise is the determination by you beyond a reasonable doubt that a defendant is guilty of the offense of conspiracy to distribute in excess of 1,000

pounds of marihuana as charged in Count II according to the instructions I have given you under that count, or is guilty of the offenses of distribution of marihuana or importation of marihuana as set forth in paragraphs A through R of Count I of the Indictment according to the instructions I have previously given you concerning those offenses. If you determine that a defendant is guilty of any of these offenses you must determine next the second element of Count I, namely, whether the violation or violations are a part of a continuing series of violations of the federal drug laws.

I charge you that the term "series" generally means "three or more" and that the term "continuing" means, "enduring, subsisting for a definite period or intended to cover or apply to successive, similar occurrences." Thus,

you must find beyond a reasonable doubt that a defendant committed three or more successive violations of the federal drug laws, over a definite period of time with a single or substantially similar purpose.

Thus, you must find beyond a reasonable doubt that the defendant is guilty of conspiracy to distribute more than 1,000 pounds of marihuana as charged in Count II and/or that he is guilty of knowingly and intentionally distributing marihuana or importing marihuana as set forth in paragraphs A through R of Count I of the indictment and that this conduct, together with any additional violations of the drug laws constituted a total of three or more violations of the federal drug laws committed over the period of time charged in Count I with a single or similar purpose. This will constitute a finding

that a defendant engaged in a continuing series of violations.

The third requirement is that a defendant committed those violations in concert with five or more persons. It is not required that the five or more persons be engaged with a defendant in the commission of the continuing series of violations at the same moment or that all five were present at the same time or that all five were present at the same place. It is not required that a defendant acted in concert with five or more persons in the commission of any single offense that is one of the series of offenses constituting the continuing criminal enterprise. For purposes of this element, it is sufficient if it is proven that during the course of the commission of the continuing series of violations, a defendant supervised, managed

or organized a total of five or more persons.

The fourth requirement is that you find beyond a reasonable doubt that a defendant occupied a position of organizer, a supervisory position or other position of management with respect to such five or more other persons. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one operation or enterprise. A supervisory position can be defined as meaning one who manages or directs or oversees the activities of others.

The relationship of organizer, manager or supervisor need not have existed with regard to the five persons at the same time, those five persons need not have acted in concert, and the same type of supervision need not have been exercised

over each person. While you must unanimously find that the relationship of organizer, manager, or supervisor existed with regard to five persons you do not have to unanimously agree on the identity or same combination of five people. The supervision need not be direct. Indirect supervision of others, such as by delegation of authority to one or more lieutenants does not detract from the ultimate status as an organizer, supervisor or manager. Furthermore, it is not necessary that the supervisor, manager or organizer had personal contact with each person or that he knew all of them or that other persons may have exercised supervision superior to the defendant. The relationship of organizer, manager, or supervisor I have described may include a "middleman" who coordinates activities of others.

The fifth requirement is that a defendant obtained substantial income or resources from the continuing series of violations of the federal drug laws.

The term "substantial" means "of real worth and importance; of considerable value; valuable."

The term "income" can include money or other property received or acquired from the transactions in violation of the drug laws.

Substantial income does not necessarily mean net income. That is to say, it could mean gross receipts or gross income. From what I have already said, it would follow that the phrase "substantial income" should be construed as far as possible in an objective manner. That is, in order to find a defendant guilty of engaging in a continuing criminal enterprise under Count I you must find that

a defendant received what any reasonable person would consider to be considerable or ample funds from engaging in a continuing violation of the drug laws.

Put differently it would be insufficient to support any conviction here if all you were to determine was that although a defendant was guilty of committing a series of violations, he obtained only occasional moderate sums of money from these violations.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you have found that the defendant has engaged in a continuing criminal enterprise and you should then proceed to determine whether or not a defendant is a principal administrator, organizer, or leader of the

continuing criminal enterprise according to the instructions I will give you.

If on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty as charged in Count I.

To sustain the charge of being a principal administrator, organizer or leader of a continuing criminal enterprise as charged in Count I, the government must prove, in addition to the fact that the defendant was engaged in a continuing criminal enterprise, the following propositions:

First, that a defendant was the principal administrator, organizer, or leader of the continuing criminal enterprise or was one of several such principal administrators, organizers, or leaders of a continuing criminal enterprise that continued after the effective date of the statute, October 27, 1986; and

Second, that after October 27, 1986, a defendant committed a violation of importing marihuana, distributing marihuana or conspiracy to distribute marihuana as charged which involved at least 30,000 kilograms (66,000 pounds) of marihuana.

or

that the enterprise in which a defendant was a principal or one of several principal administrators, organizers, or leaders received $10 million dollars in gross receipts between October 27, 1986, and including February 1987, for the importation or distribution of marihuana.

To find that the first element is satisfied as to the defendant you are considering, that defendant must not only be an "administrator, organizer or leader or one of several such principal administrators, organizers or leaders" of the continuing criminal enterprise but must also be a "principal administrator, organizer or leader or one of several such principal administrators, organizers or leaders." You should also give the word

"principal" its ordinary and everyday meaning.

Thus, in order to find beyond a reasonable doubt that a defendant is one of the "principal administrators, leaders or organizers or is one of several such principal administrators, organizers or leaders" of a continuing criminal enterprise, you must find that he was not merely a member of the management of the enterprise, but instead ranked in the highest level of administration, leadership or control; that is, he was among the most important, consequential or influential members of the alleged continuing criminal enterprise.

"Gross receipts" as set forth in this instruction means the total amount of money received by the enterprise as a whole from the sale of marihuana. It does not include any monies that the enterprise

anticipated receiving but did not in fact receive. "Gross receipts" is not limited to profits, and thus it includes earnings spent on payroll or other costs of doing business. In addition, it bears emphasis that what is at issue is the amount of money received by the enterprise as a whole. Accordingly, the government need not prove beyond a reasonable doubt that any of the three defendants charged in Count I personally received the money.

Thus, for example, if you find that a quantity of marihuana was sold by a member of the enterprise, and that the seller deducted his expenses and then sent the remainder of the proceeds of the sale to another member of the enterprise, then you should consider the entire amount received by the seller--not just the amount he passed on--in determining the

enterprise's total gross receipts for that sale.

If you find from your consideration of all evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty as charged in Count 1.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

GOVERNMENT'S SUGGESTED JURY
INSTRUCTION NO. 20
Second Amended

6.01 7th Circuit Pattern Jury Instruction

Section 58.21 Devitt and Blackmar Federal Jury Practice and Instructions (Amended in accordance with:
United States v. Jeffers, 532 F.2d 1101, 1116 (7th CIr. 1976), aff'd in part, vacated in part, 432 U.S. 137 (1977).
United States v. Becton, 751 F.2d 250, 254-255 (8th Cir. 1984).

United States v. Adamo, 742 F.2d 927, 933 (6th Cir. 1984).
United States v. Jones, No. 85-2351 (8th Cir. Sept. 11, 1986).
United States v. Bolts, 558 F.2d 316, 320 (5th Cir. 1977), cert denied, 434 U.S. 930, 98 S.Ct. 417, 439 U.S. 898, 99 S.Ct. 262.
United States v. Bond, Nos. 86-3012 to 86-3015, Seventh Circuit, decided May 16, 1988.
United States v. Phillips, 664 F.2d 971, 1034 (5th Cir. 1981).
United States v. Tarvers, 833 F.2d 1068 (1st Cir. 1987).
United States v. Apodaca, 843 F.2d 421 (10th Cir. 1988).

REQUESTED JURY INSTRUCTION 1

21 U.S.C. SECTION 848(b)[1]
CONTINUING CRIMINAL ENTERPRISE
ELEMENTS OF THE OFFENSE

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[1] 21 U.S.C. Subsection 848(b), establishing a mandatory penalty of life, was added by the Anti-Drug Abuse Act of 1986, pub.L. 99-570, which was signed into law and became effective on October 27, 1986. In order not to run afoul of the prohibition against ex post facto laws contained in Article I, Section 9, of the United States Constitution, the elements of the offense of violating Section 848(b) must be proven beyond a reasonable doubt to have occurred after the effective date of the enactment of 848(b); that is, October 27, 1986.

The Supreme Court repeatedly has held that "the ex post facto prohibition forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." Weaver v. Graham, 450 U.S. 24, 30 (1981) (citing and discussing cases); Miller v. Florida, ____ U.S. _____, 107 S.Ct. 2446, 96 L.Ed.2d 351, 359, 363 (1987). See also, Weaver, supra, 450 U.S. at 28, quoting Cummings v. Missouri, 4 Wall. 277. 325-326, 18 L.Ed. 356 (1987) (ex post facto clause prohibits the imposition of any law "'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'").

The first count in the indictment, Count One, generally, charges RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, AND EUGENE ALBERT FISCHER, as being the principal administrators, organizers or leaders of a continuing criminal enterprise, the function of which, the government claims, was to distribute, possess with intent to distribute and import marijuana on a continuing and substantial basis. The charge is based upon Title 21, Section 848(b) of the United States Code, which states that a person has violated this section if

(1) he violates any provisions of the federal narcotics laws, the punishment for which is a felony, and;

(2) such violation is a part of a continuing series of violations of the federal narcotics laws

(a) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of principal administrator, organizer or leader.

(b)(1) that the violation involved at least a specified amount of a particular controlled substance; and

(2) that the enterprise received at least $10 million in gross receipts during any 12 month period of its existence for the manufacture, importation, or distribution of certain specific controlled substances.

This statute was not effective until October 27, 1986.[2] Thus, although

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[2] A defendant is entitled to an instruction regarding the enactment date of the statute under which he is charged, in an effort to avoid an ex post facto violation. United States v. Todd, 735 F.2d 146, 150 (5th Cir. 1984); United States v. Brown, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978). Cf. United States v. Cortez, 757 F.2d 1204, 1207 (11th Cir. 1985)

you have heard testimony relating to acts and events prior to this date, I instruct you that you may only find a violation, and that it is part of a continuing series of violations, and that the defendant under consideration is the principal administrator, organizer or leader in connection with such violations, from evidence of acts or events which occurred after October 27, 1986.

All evidence heard by you regarding acts or events prior to October

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("Requiring proof of illegal conduct after the enactment of the statute prevents it from running afoul of the ex post facto clause," citing to United States v. Brown, supra, which reversed convictions where jury was not advised of the effective date of the act or that it must find evidence of a violation after that effective date.). See also, United States v. Boffa, 688 F.2d 919, 937 (3rd Cir. 1982) (where Court rejected an ex post facto challenge to convictions because the jury was instructed it had to find proof of RICO conspiracy after a date which was subsequent to the date of enactment).

27, 1986, may only be used by you as bearing upon the existence, purpose and/or significance of later behavior.[3]

I thus instruct you that only acts occurring after October 27, 1986, may be considered. Thus only those acts charged in the indictment and occurring after October 27, 1986 may be used by you in considering whether the elements of the continuing criminal enterprise have been proven beyond a reasonable doubt.

In order to meet its burden of proof on the specific crime charged in Count One of the indictment (charging RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER and EUGENE ALBERT FISCHER), the government must prove beyond a reasonable doubt each of the following six elements:

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[3] United States v. Flores, 538 F.2d 939, 944 (2d Cir. 1976); United States v. Fino, 478 F.2d 35, 38 (2d Cir. 1973).

FIRST, that the defendant you are considering violated a felony provision of the federal narcotics laws after the enactment date of the statute, October 27, 1986.

SECOND, that this offense was part of a series of three or more offenses committed by the defendant in violation of the federal narcotics laws.

THIRD, that the defendant committed the offenses in these series of violations, in concert with five or more persons.

FOURTH, that the defendant that you are considering is the principal administrator, organizer, or leader of the continuing criminal enterprise.

FIFTH, that the three violations referred to above occurred after October

27, 1986, and involved at least 30,000 kilograms of marijuana; and[4]

SIXTH, that the continuing criminal enterprise charged in the indictment, in which the defendant you are considering was the principal administrator, organizer, or leader and received $10 million in gross receipts during any 12 month period of its existence for the importation or distribution of marijuana.

REQUESTED JURY INSTRUCTION 3

SECOND ELEMENT:
CONTINUING SERIES OF VIOLATIONS

The second element that the government must prove beyond a reasonable doubt is that the defendant you are considering committed a continuing series of offenses in violation of the federal narcotics laws. In order to constitute a

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[4] See Indictment, p. 5, paragraph 2(a).

"series" the government must prove that the defendant you are considering acted in concert with five or more individuals with respect to whom such defendant is the principal administrator, organizer or leader, while committing three or more violations of the federal narcotics laws. These three or more offenses must have been alleged in the indictment, and must have occurred after October 27, 1986.

Again, only acts occurring after October 27, 1986, may be considered by you in determining whether this element has been proven; if you are first convinced that each of the elements of each such violation (about which I will instruct you later) have been proven beyond a reasonable doubt.

The term "continuing" means "enduring" and existing for a definite

period and relates to successive and similar occurrences.

The commission of three narcotics violations do not constitute a "series" of offenses and thus satisfy this element unless the violations in which the defendant under consideration is determined to have participated arise from at least three separate, distinct instances of conduct. Let me explain to you what I mean by this.

A defendant's participation in a single instance of conduct involving narcotic drugs may make him guilty of a number of statutory offenses. Thus, in the course of one instance of conduct, he may have committed several different violations of the narcotics laws. To constitute a "series," not only must there be three or more offenses, but they must relate to

three or more separate, distinct instances of conduct on the defendant's part.

In addition, you may not find this element satisfied unless you are in unanimous agreement as to the identity of these offenses constituting a series. In this regard, you must similarly be unanimous as to the identity of the controlled substance imported, possessed or distributed which was involved in the series of three or more violations.

For example, if some of you find that the defendant committed certain offenses constituting a series, while others find that he committed other offenses constituting a series, you may not find him guilty on that basis. Thus, before you can find this element satisfied, all of you must be in agreement that the defendant committed the same three offenses which comprise the series. If you

unanimously agree on three or more, you must signify which acts on the special verdict form that I will supply you.

Finally, before this element can be satisfied, you must also unanimously agree upon the identity of the five or more individuals with whom the series of three or more violations were committed.

LANIER'S REQUESTED JURY INSTRUCTION 13

Venue generally is defined as that place where it is appropriate to bring a prosecution. Venue is a legal term that signifies an offense occurred within the territorial jurisdiction of the court. Without venue, a court is not able to try the particular case before it.

Venue is appropriate in this case if you find that the offense was begun, continued, or completed within the Southern District of Illinois.

To find venue in the Southern District of Illinois, you must find that an offense occurred within the Southern District of Illinois. Further, as to Count One, you must find that such offense occurred in the Southern District of Illinois after October 27, 1986. If you find that the offenses stated in Count One did not occur as alleged, or did not occur in the Southern District of Illinois after October 27, 1986, you will find the defendants charged in Count One not guilty.

Black's Law Dictionary and Title 18 U.S.C. 3237.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDY THOMAS LANIER,
BENJAMIN BARRY KRAMER
GEORGE PAUL BROCK,
EUGENE ALBERT FISCHER,
WILLIAM R. PALUMBO, and
KAY DEE BELL, JR.,

Defendants.

Criminal No. 87-40070

Title 21
Sections 846 and 848

Title 18
Section 371

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

Count 1

That from in or about March 1980, and continuing thereafter up to and including February 1987, the exact dates being unknown to the Grand Jury, in St.

Clair, Madison, and Jefferson Counties, within the Southern District of Illinois, Kentucky, Florida, California, West Virginia, Louisiana, New York, Pennsylvania, Michigan, Indiana and elsewhere, RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, GEORGE PAUL BROCK, and EUGENE ALBERT FISCHER, the defendants herein, knowingly and intentionally did engage in a Continuing Criminal Enterprise in that they did violate Title 21, United States Code, Sections 841(a)(1), 952(a), 960, and 846 that is, distributing and possessing with intent to distribute marihuana, importing marihuana, and conspiring to distribute marihuana, a Schedule I Controlled Substance, which violations were part of a continuing series of violations of said statutes undertaken by each defendant in concert with at least five other persons, with respect to whom each defendant

occupied a position of organizer, supervisor, or manager, which violations include three or more of the violations set forth in Count 2 of this indictment and in the following paragraphs A through R:

A. In or about January 1982, in Pompano Beach, Florida, RANDY THOMAS LANIER did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 800 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

B. In or about March or April 1982, in Pompano Beach, Florida, RANDY THOMAS LANIER did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 800 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

C. In or about July or August 1982, in Pompano Beach, Florida, RANDY THOMAS LANIER did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 800 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

D. In or about July 1982, in Melbourne, Florida, BENJAMIN BARRY KRAMER and RANDY THOMAS LANIER did distribute and possess with intent to distribute a Schedule I controlled substance, that is, 15,000 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

E. In or about July 1982, BENJAMIN BARRY KRAMER and RANDY THOMAS LANIER did knowingly and intentionally import into the United States, that is Melbourne, Florida, from a place outside thereof, a controlled substance, that is approximately 15,000 pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

F. In or about August 1982, in Melbourne, Florida, BENJAMIN BARRY KRAMER and RANDY THOMAS LANIER did distribute and posses with intent to distribute a Schedule I controlled substance, that is, approximately 18,000 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

G. In or about August 1982, BENJAMIN BARRY KRAMER, and RANDY THOMAS LANIER, did knowingly and intentionally import into the United States that is Melbourne, Florida from a place outside thereof, a controlled substance, that is approximately 18,000 pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

H. In or about November 1982, in New [illegible], New York, RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, GEORGE PAUL BROCK and EUGENE ALBERT FISCHER did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 35,000 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

I. In or about November 1982, BENJAMIN BARRY KRAMER, RANDY THOMAS LANIER, GEORGE PAUL BROCK, and EUGENE ALBERT FISCHER did knowingly and intentionally import into the United States, that is New York, New York, from a place outside thereof, a controlled substance, that is approximately 35,000 pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

J. In or about March or April 1983 in New York, New York, RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, GEORGE PAUL BROCK, and EUGENE ALBERT FISCHER, did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 130,000 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

K. In or about March or April 1983, BENJAMIN BARRY KRAMER, RANDY THOMAS LANIER, GEORGE PAUL BROCK, and EUGENE ALBERT FISCHER, did knowingly and intentionally import into the United States, that is New York, New York, from a place outside thereof, a controlled substance, that is approximately 130,000 pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

L. In or about April 1984, in San Francisco, California, RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, GEORGE PAUL BROCK, and EUGENE ALBERT FISCHER, did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 165,000 pounds of marihuana,

in violation of Title 21, United States Code, Section 841(a)(1).

M. In or about April 1984, BENJAMIN BARRY KRAMER, RANDY THOMAS LANIER, GEORGE PAUL BROCK, and EUGENE ALBERT FISCHER, did knowingly and intentionally import into the United States, that is San Francisco, California, from a place outside thereof, a controlled substance, that is approximately 165,000 pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

N. In or about March or April 1984, in Pompano Beach, Florida, RANDY THOMAS LANIER did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 800 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

O. In or about April 1985, in New Orleans, Louisiana, RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, GEORGE PAUL BROCK and EUGENE ALBERT FISCHER did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 150,000 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

P. In or about April 1985, BENJAMIN BARRY KRAMER, RANDY THOMAS LANIER, GEORGE PAUL BROCK and EUGENE ALBERT FISCHER, did knowingly and intentionally import into the United States, that is New Orleans, Louisiana, and Millstadt, Illinois, in the Southern District of Illinois, from a place outside thereof, a controlled substance, that is approximately 150,000 pounds of

marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

Q. On or about November 12, 1986, in San Francisco, California, RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, GEORGE PAUL BROCK and EUGENE ALBERT FISCHER did distribute and possess with intent to distribute a Schedule I controlled substance, that is, approximately 137,000 pounds of marihuana, in violation of Title 21, United States Code, Section 841(a)(1).

R. On or about November 12, 1986, BENJAMIN BARRY KRAMER, RANDY THOMAS LANIER, GEORGE PAUL BROCK, and EUGENE ALBERT FISCHER, did knowingly and intentionally import into the United States, that is San Francisco, California, from a place outside thereof, a controlled substance, that is approximately 137,000 pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 952(a) and 960(a)(1).

from which continuing series of violations the defendants obtained substantial income and resources to which the United States is entitled to forfeiture.

The Grand Jury further charges with respect to Count 1:

1. That RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, GEORGE PAUL BROCK,

and EUGENE ALBERT FISCHER, are each principal administrators, organizers and leaders of the enterprise described herein and each is one of several such principal administrators, organizers, and leaders; and

2. (a) That the violation referred to in paragraphs Q and R of this count of the indictment involved at least 30,000 kilograms of marihuana; and

(b) That the enterprise described herein in which RANDY THOMAS LANIER, BENJAMIN BARRY KRAMER, GEORGE PAUL BROCK and EUGENE ALBERT FISCHER were each one of several principal administrators, organizers, and leaders, received in excess of ten (10) million dollars in gross receipts during the period from November 25, 1986, to and including February 1987, for the importation and distribution of marihuana as described herein; all in

violation of Title 21, United States Code, Section 848(b).

(2) (2)

Nos. 92-115 and 92-177

FILED
OCT 15 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE ALBERT FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

BENJAMIN BARRY KRAMER AND
RANDY THOMAS LANIER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether petitioners' life sentences, under 21 U.S.C. 848(b), for being principal administrators, organizers, or leaders of a continuing criminal enterprise violated the Ex Post Facto Clause of the Constitution.

2. Whether the jury must be instructed that it must unanimously agree on which drug offenses comprised the "series of violations" element of a CCE offense (No. 92-115).

3. Whether the district court properly denied petitioner's motion for leave to depose foreign witnesses (No. 92-115).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-115

EUGENE ALBERT FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 92-177

BENJAMIN BARRY KRAMER AND
RANDY THOMAS LANIER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App 1a-59a)[1] is reported at 955 F.2d 479.

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[1] "Pet. App." refers to the Appendix filed in No. 92-177, except where indicated otherwise.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. A petition for rehearing was denied on April 14, 1992. The petitions for a writ of certiorari were filed on July 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioners were convicted of conspiring to distribute marijuana, in violation of 21 U.S.C. 846, and engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Pet. App. 2a. Petitioner Lanier was also convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Petitioners were sentenced to life imprisonment without possibility of parole on the CCE count. Petitioners Lanier and Kramer were also sentenced to 40 years' imprisonment on the Section 846 conspiracy count, and petitioner Fischer was sentenced to 35 years' imprisonment on the Section 846 conspiracy count, with those sentences to run concurrently with the CCE sentences. In addition, petitioner Lanier was sentenced to 5 years' imprisonment on the Section 371 conspiracy count, with that sentence to run consecutively to his sentence for the Section 846 conspiracy. Petitioners Lanier and Kramer were ordered to forfeit $60,000,000, while petitioner Fischer was ordered to forfeit $30,000,000. Pet. App. 3a. The court of appeals affirmed. *Id.* at 1a-59a.

1. The evidence showed that petitioners ran a marijuana smuggling operation from which they reaped tens of millions of dollars in profits in the early to mid-1980's. In 1982, Lanier and Kramer arranged for two boatloads of marijuana to be imported from Colombia to Melbourne Beach, Florida. Fischer assisted Lanier and Kramer in organizing and carrying out the next five transactions.

In the spring of 1983, they imported 30,000 pounds of marijuana into Bridgeport, Connecticut, and arranged its distribution. In the fall of 1983, they transported a barge containing approximately 14,000 pounds of marijuana to New York. Pet. App. 4a-6a. Marijuana from each of those loads was transported to Southern Illinois for distribution. Gov't C.A. Br. 5-6, 8.

In the next transaction, which took place in 1984, Lanier, Kramer, and Fischer imported a bargeload of 147,000 pounds of marijuana into San Francisco. Customers of Lanier and Kramer delivered some of that marijuana to Millstadt, Illinois. The sale of the marijuana brought in more than $50 million. In the spring of 1985, the enterprise smuggled a bargeload of approximately 152,000 pounds of marijuana into New Orleans, some of which was shipped to Millstadt. Kramer purchased the marijuana in Colombia, Fischer rented the dock space and arranged to bring the barge to dock, and Lanier directed its unloading. Pet. App. 6a-7a.

In the final transaction, which took place in November 1986, petitioners' enterprise imported approximately 130,000 pounds of marijuana into San Francisco. Kramer arranged for the purchase and, with Lanier, the distribution of the marijuana, while Fischer provided the workers who removed the marijuana from the barge and loaded it onto trailers. The enterprise collected $34,795,000 for that load. Kramer received $12,500,000; Fischer split $10,253,000 with another principal in the enterprise, George Brock; and Lanier received the balance. Pet. App. 8a-9a.

2. Prior to trial, Fischer asked the district court for leave to take the depositions of ten foreign witnesses—two in Venezuela, six in the Dominican Republic, one in Great Britain, and one in the Netherlands. Fischer stated in his motion that those witnesses, two of whom were unindicted co-conspirators, would refute govern-

ment allegations that Fischer owned certain vessels and entities connected with vessels involved in the marijuana smuggling operation. Fischer also stated that the witnesses were unwilling to travel to the United States to testify. May 24, 1988, Mem. and Order at 1-2.

The district court denied the motion, stating that Fischer had "not sustained his burden of proving that extraordinary circumstances exist justifying foreign depositions." May 24, 1988, Mem. and Order at 2-3. The court explained that Fischer had offered only conclusory statements concerning the unavailability of the witnesses. He had failed to specify sufficiently what testimony the witnesses would give, to provide an explanation of the witnesses' knowledge of the matters about which they would testify, to demonstrate that the testimony would not be cumulative of other evidence, and to establish the materiality of the testimony. *Id.* at 2-4. On the matter of materiality, the court stated that Fischer's "legitimate connections with the[] vessels or entities would not necessarily dispel their concurrent illegal use." *Id.* at 3.

3. The continuing criminal enterprise (CCE) statute provides for a mandatory life sentence for a person engaging in a CCE offense if

> (1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and (2)(A) the violation [referred to in the provision defining "continuing criminal enterprise"] involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufac-

> ture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

21 U.S.C. 848(b).

At trial, the district court submitted to the jury the question whether petitioners were liable under Section 848(b). The court instructed the jury that, in order to conclude that a defendant was a principal administrator, organizer, or leader of a continuing criminal enterprise within the meaning of the statute, it would have to find both of the following:

> First, that a defendant was the principal administrator, organizer, or leader of the continuing criminal enterprise or was one of several such principal administrators, organizers, or leaders of a continuing criminal enterprise that continued after the effective date of the statute, October 27, 1986:
>
> Second, that after October 27, 1986, a defendant committed a violation of importing marijuana, distributing marijuana or conspiracy to distribute marijuana as charged which involved at least 30,000 kilograms * * * of marijuana or that the enterprise in which a defendant was a principal * * * received $10 million in gross receipts between October 27, 1986, and including February 1987, for the importation or distribution of marijuana.

Pet. App. 12a-13a.

As to venue, the court instructed the jury that it could convict a defendant only if it found that the defendant committed at least one of the predicate drug offenses in the Southern District of Illinois. It did not require the jury to find that a predicate offense occurred in that district after the effective date of Section 848(b). Gov't C.A. Br. 43.

4. On appeal, petitioners contended that Section 848(b) is a separate substantive offense rather than a sentence enhancement provision. Therefore, they claimed, their CCE convictions violated the Ex Post Facto Clause of the United States Constitution because the instructions did not require the jury to find that they engaged in the predicate drug offenses after October 27, 1986. The court of appeals did not reach the validity of petitioners' premise that Section 848(b) creates a substantive offense, although it expressed the view that it does not. Pet. App. 15a. The court held, however, that even if that premise were correct there would be no ex post facto violation. *Id.* at 16a. The court explained that the Ex Post Facto Clause does not prohibit prosecution for offenses that began before the effective date of the statute and continued thereafter. *Id.* at 17a. The court then observed that in its view the district court's instruction properly required the jury to find that petitioners were principal administrators, organizers, or leaders of a continuing criminal enterprise until after the effective date of Section 848(b), and that the evidence showed that petitioners continued to participate in the enterprise after that date. Pet. App. 19a.

Petitioners further argued that venue for the CCE charge did not lie in the Southern District of Illinois because none of the predicate acts occurred in that district after the effective date of Section 848(b). The court held that, because the CCE offense continued after the effective date of Section 848(b), venue could be established by proof that an act in furtherance of the offense took place in the Southern District of Illinois before the statute's effective date. Pet. App. 22a. The court then concluded that the evidence was sufficient to establish proper venue. *Id.* at 23a.

The court of appeals also found no merit in Fischer's claim that the district court should have instructed the

jury that it must agree unanimously as to each of the predicate offenses constituting the "continuing series" element of the CCE offense. The court relied, Pet. App. 25a-26a, on its earlier decision in *United States* v. *Canino*, 949 F.2d 928 (7th Cir. 1991), cert. denied, 112 S. Ct. 1940 (1992), which held that "[t]he constitutional requirement of juror unanimity in federal criminal offenses is satisfied when each juror in a CCE trial is convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed two predicate offenses." 949 F.2d at 948.

Finally, the court rejected without discussion petitioner Fischer's claim that the district court improperly refused to allow him to obtain the depositions of the foreign witnesses. Pet. App. 53a.

ARGUMENT

1. Petitioners contend (91-115 Pet. 10-37; 92-177 Pet. 12-43) that the application of Section 848(b) in this case violated the Ex Post Facto Clause because the jury was not required to find that petitioners acted as principal administrators, organizers, or leaders of the enterprise after October 27, 1986, the effective date of Section 848(b), or that they committed at least one of the predicate drug offenses in the Southern District of Illinois, the jurisdiction in which venue was laid, after that date.[2]

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[2] We do not believe it was necessary for the district court to submit the question of the applicability of Section 848(b) to the jury because, in our view, the statute, rather than creating a new substantive offense, is a sentencing provision providing for enhanced punishment for certain violations of Section 848(a). This is suggested, among other factors, by the title of the statute—"Conditions for Life Imprisonment for Engaging in Continuing Criminal Enterprise"; by the fact that the statute contains an explicit reference to the necessary conviction under the predicate provision, Section 848(d) (now codified at subsection (c)); and by the fact that the statute limits the district court's discretion in sen-

The Ex Post Facto Clause prohibits Congress from "punish[ing] as a crime an act previously committed, which was innocent when done" or "mak[ing] more burdensome the punishment for a crime, after its commission." *Collins* v. *Youngblood*, 110 S. Ct. 2715, 2724 (1990). The purpose of the prohibition is "to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981).

Petitioners' enhanced sentences under Section 848(b) did not violate the Ex Post Facto Clause. As the court of appeals observed, Pet. App. 17a, it is well settled that the ex post facto prohibition is not violated when an offense, though begun before the effective date of the pertinent statute, continues thereafter. See *United States* v. *Giry*, 818 F.2d 120, 135 (1st Cir.), cert. denied, 484 U.S. 855 (1987); *United States* v. *Baresh*, 790 F.2d 392, 404 (5th Cir. 1986); *United States* v. *Campanale*, 518 F.2d 352, 365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Ferrara*, 458 F.2d 868, 874 (2d Cir.), cert. denied, 408 U.S. 931 (1972). There can be no question that the CCE statute, which makes it a crime to engage in a "continuing criminal enterprise," defines a continuing offense. See *United States* v. *Johnson*, 537 F.2d 1170 (4th Cir. 1976). Accordingly, subjecting a defendant to the penalty prescribed in Section 848(b) would violate the Ex Post Facto Clause only if the defendant's criminal conduct terminated before October 27, 1986, the effective date of Section 848(b). Cf. *Campanale*, 518 F.2d at 365

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tencing within the range set forth in Section 848(a). Petitioners do not challenge the district court's submission of the sentence enhancement determination to the jury; on the contrary, they take the position that Section 848(b) is a substantive provision and therefore that that action was proper. 91-115 Pet. 10-19; see 92-177 Pet. 34 n.10.

(RICO statute applies where racketeering continued after RICO's effective date).

In this case, the district court instructed the jury that it could find Section 848(b) applicable to a defendant only if it made two findings: (1) that the defendant "was [a] principal administrator * * * of a continuing criminal enterprise that continued after the effective date of the [provision]," and (2) either that the defendant "committed a [drug offense] involv[ing] at least 30,000 kilograms * * * of marijuana" after the effective date of the provision or "the enterprise in which a defendant was a principal * * * administrator[] * * * received $10 million in gross receipts * * * for the importation or distribution of marijuana" after the effective date of the statute. Pet. App. 12a-13a. As the court of appeals concluded, those instructions adequately informed the jury that they could not apply Section 848(b) if they concluded that petitioners "stopped acting as principal administrators after § 848(b) became effective." Pet. App. 21a.

Although the instruction as given plainly can be read to require the jury to find that petitioners continued as principal administrators of the enterprise after the effective date of the statute, petitioners now in essence object that the instruction as given was ambiguous. In petitioners' view, the instruction can also be read to permit the jury to convict petitioners based on a finding that the enterprise continued after October 27, 1986, but that petitioners themselves neither continued to act as principal administrators after that date nor committed any other predicate act after that date. Petitioners never objected to the instructions, however, on the ground that they were ambiguous in this regard. Nor could any such ambiguity have affected the jury's deliberations, in light of the facts of the case and the way the case was argued to the jury.

In the district court, petitioners repeatedly objected to the indictment and the instructions on the ground that *all* elements of the Section 848(b) crime had to be satisfied after October 27, 1986. They moved for judgments of acquittal after the close of the government's case on that basis, see Tr. 8614-8615, 8623-8624; they submitted their own proposed instructions embodying that theory, see, *e.g.*, 92-177 Pet. App. 79a-81a; and they objected to the government's proposed instruction, which was adopted in relevant part by the court, on the basis of that theory as well, see Tr. 9996, 10,003, 10,486. They never asserted, however, that the instruction permitted the jury to convict them even if the jury found that they ceased acting as principal administrators, organizers, or leaders of the enterprise prior to the effective date of the statute. As we explained in our brief below, petitioners' failure to object on that ground indicates that they themselves understood the instruction as did the court of appeals and in any event that they waived any such objection they might have had. See Gov't C.A. Br. 49.

Moreover, in light of the arguments presented by both the prosecutor and defense counsel, it is highly unlikely that the jury interpreted the instruction as petitioners now allege. In their arguments to the jury, both the government and defense counsel conveyed their understanding that the jury instructions required the jury to find that the defendants were principal administrators, organizers, or leaders after the effective date of the statute. See Gov't C.A. Br. 48-49. The prosecutor informed the jury in closing argument that it "must find that the organization, or the enterprise, first of all, that he was a principal administrator after the effective date of the statute which is October 27, 1986." Tr. 10,115. Kramer's counsel told the jury in closing argument that "[y]ou will be instructed that you are to measure specific activities of Ben Kramer subsequent to October 27th, 1986,

when you are considering his culpability under Section 848(b) of Title 21."[3] Tr. 10,230. Fischer's counsel in discussing the "principal administrator, organizer or leader" requirement similarly referred to the "new law that went into effect in 1986, October 27, 1986." Tr. 10,275. In addition, during the prosecutor's rebuttal argument, there was a further colloquy between the prosecutor, Kramer's counsel, and the court in the presence of the jury, in which it was made clear that all parties shared the understanding that the "principal administrator" requirement had to be satisfied after October 27, 1986.[4]

Finally, the evidence was overwhelming that in November 1986, after the effective date of the statute, petitioners imported tons of marijuana into San Francisco and received millions of dollars in proceeds from that shipment. Even petitioner Kramer, who was not in San Francisco when the marijuana was unloaded there, received $12 million from the proceeds of the shipment. In light of the statements of various counsel themselves and the evidence in this case, the instructions adequately informed the jury that it had to find that the de-

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[3] Since the government did not allege that Kramer was on the scene during the unloading of the November 1986 shipment in San Francisco, his counsel was in the best position to take advantage of the requirement that the crime had to be shown to have continued past October 27, 1986.

[4] The prosecutor stated that "[w]ith respect to being a principal administrator, you have to determine whether or not the activity of the enterprise continued past October 27, 1987 * * * whether these individuals committed acts after October 27, 1987." Tr. 10,379. Kramer's counsel noted that the appropriate year was 1986. *Ibid.* The prosecutor corrected himself, noting that the correct date was October 27, 1986, and added that "[t]he issue is whether or not the defendants were involved after that period of time and committed one of those acts. For instance, importation." *Ibid.*

fendants acted as principal administrators, organizers, or leaders of the enterprise after October 27, 1986.

Petitioners' reliance on *United States* v. *Torres*, 901 F.2d 205 (2d Cir. 1990), is misplaced. In that case, the jury was permitted to convict the defendants of violating Section 848(b) based on a finding that the elements of the statute were satisfied during a one-year period that straddled the effective date of the statute. 901 F.2d at 226. Because of the possibility that the jury relied exclusively on the defendants' role in the enterprise before the effective date of the statute, the court remanded the case for resentencing. In this case, by contrast, the jury instructions did not authorize the application of Section 848(b) if the jury found that petitioners were no longer principal administrators, organizers, or leaders after the statute became effective.[5]

Nor was the Ex Post Facto Clause violated by the district court's failure to instruct the jury that, in order to convict, it had to find that petitioners committed a predicate act in the Southern District of Illinois after the effective date of Section 848(b). For a continuing offense

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[5] Petitioner Fischer argues (92-115 Pet. 30) that conspiracy does not qualify as a predicate offense for purposes of CCE and that the jury instructions impermissibly permitted the jury to apply Section 848(b) even if it found that the violation of the drug laws they committed after the effective date of the statute was the crime of conspiracy. On appeal, the court of appeals agreed with petitioners that conspiracy may not be counted as a predicate act, but the court held that the error in the instructions was harmless because petitioners were also charged with a number of substantive predicate offenses, including the post-October 27, 1986, San Francisco importation, that were "more than adequate" to meet the "series" element. Pet. App. 24a. No other court of appeals that has addressed the issue would have reached a different result, since each of those courts has held that conspiracy *may* qualify as a predicate act. See *United States* v. *Hicks*, 945 F.2d 107, 108 (5th Cir. 1991) (citing cases).

such as CCE, venue is proper in any district in which the offense "was begun, continued, or completed." See 18 U.S.C. 3237(a). We know of no authority—and petitioners cite none—for the proposition that, under the Ex Post Facto Clause, the act on which venue is based must occur after the effective date of the charging statute, where the crime commenced before that date. Such a requirement would have no relation to the purpose of the Ex Post Facto prohibition, which is to ensure that individuals have notice of what conduct is deemed criminal and how it will be punished. See *Miller* v. *Florida*, 482 U.S. 423, 433 (1987). Nor would it have any relation to the purpose of the constitutional or statutory venue provisions, which are safeguards "against the unfairness and hardship involved when an accused is prosecuted in a remote place." *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964). Accordingly, further review to consider whether the court of appeals should have adopted petitioners' novel venue argument is unwarranted.

2. Petitioner Fischer contends (92-115 Pet. 38-46) that the district court should have instructed the jurors that they must unanimously agree on which particular violations of law constituted the "series of violations" required to establish a CCE offense.

The CCE statute imposes criminal penalties for engaging in a "continuing criminal enterprise." 21 U.S.C. 848. It further states that a person is engaged in a continuing criminal enterprise if (1) he violates a provision of subchapter I or II of chapter 13 of Title 21 (dealing with control, enforcement, import and export of drugs); and (2) "such violation is a part of a continuing series of violations" of those subchapters, in which the person organizes, manages, or supervises five or more other participants and the person obtains substantial income. 21 U.S.C. 848(c). Thus, the CCE statute requires the jury

to find that the defendant's violation has a certain characteristic, *i.e.*, that it is "a part of a continuing series of violations." But the statute does not require unanimous agreement as to the specific identity of the other violations that make up that series. The jury's unanimous agreement that the subject violation is "a part of a continuing series of violations" is sufficient to satisfy that element of the offense.[6]

That conclusion is consistent with settled law concerning jury unanimity and sufficiency of the evidence. This Court has consistently recognized that an indictment need not specify what means, among several named, was used to commit a crime, and that a jury need not agree on a single means of commission. See *Griffin* v. *United States*, 112 S. Ct. 466, 469-470 (1991); *Schad* v. *Arizona*, 111 S. Ct. 2491, 2496-2497 (1991) (plurality opinion). As the court noted in *Schad*,

> [i]n these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

Id. at 2497 (plurality opinion) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990)); accord 111 S. Ct. at

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[6] The courts of appeals have generally concluded that a "series of violations" means three or more violations. See *United States* v. *Hall*, 843 F.2d 408, 411 (10th Cir. 1988); *United States* v. *Ordonez*, 737 F.2d 793, 806 (9th Cir. 1984). The Seventh Circuit has held that two violations, excluding conspiracy and other inchoate offenses, are sufficient. *United States* v. *Baker*, 905 F.2d 1100, 1102-1104, cert. denied, 111 S. Ct. 206, 270, 686 (1990). The jury instruction here required three violations and allowed the conspiracy charge to be counted. Hence, this case does not raise the question whether the Seventh Circuit's rule that two offenses constitute a "series" under the CCE statute is correct.

2506 (Scalia, J., concurring in part and concurring in the judgment). In the case of CCE prosecutions, it is sufficient that the jurors unanimously agree that the defendant committed a drug offense and that the offense was "a part of a continuing series of violations." The jury need not unanimously agree on which particular violations constituted that series.

Fischer argues that the court of appeals' decision conflicts with the Third Circuit's decision in *United States* v. *Echeverri*, 854 F.2d 638, 643 (1988). In *Echeverri*, the court of appeals, explicitly relying on the theory of juror unanimity that the Fifth Circuit employed in *United States* v. *Gipson*, 553 F.2d 453 (1977), held that a district court committed reversible error by failing to instruct a jury that it must unanimously agree on the constituents of the "continuing series of violations."[7] *Schad*, however, specifically disapproved of the *Gipson* analysis, stating that *Gipson*'s focus on juror unanimity did not answer the question whether the alternative findings permitted by the statute were merely different means of committing the same crime or separate and distinct offenses. 111 S. Ct. at 2498 & n.5. Accordingly, *Schad* has undermined *Echeverri*'s foundation.

Significantly, the Third Circuit held in another case predating *Schad* that a specific unanimity instruction

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[7] The Third Circuit also cited *United States* v. *Beros*, 833 F.2d 455, 460 (3d Cir. 1987), which also relied on *Gipson*. See *Echeverri*, 854 F.2d at 642. The Third Circuit did not make entirely clear whether such an instruction is required in every CCE case or only in unusually complex CCE cases. The court emphasized that the indictment in the case before it did not specify the violations that constituted the continuing series and offered no aid in focusing the jury's attention on the predicate acts. It also noted that the district court gave a specific unanimity instruction on predicate acts pertaining to a racketeering count, which, when coupled with the absence of a specific unanimity instruction on the CCE count, might have confused the jury. 854 F.2d at 643.

was *not* required with respect to a different aspect of the CCE offense—the identities of the five or more underlings necessary to sustain a CCE charge. *United States* v. *Jackson*, 879 F.2d 85 (1989). As the Seventh Circuit has noted, the Third Circuit's rulings in *Echeverri* and *Jackson* are difficult to reconcile. *United States* v. *Canino*, 949 F.2d at 946-947. In light of this Court's decision in *Schad*, it is at least unclear that the Third Circuit would adhere to its holding in *Echeverri* if it were to face the issue again in a future case.[8] Accordingly, it cannot be concluded that there is a continuing conflict between the Seventh and Third Circuits concerning the need for a specific unanimity instruction on the predicate acts in a CCE case.

3. Petitioner Fischer contends (92-115 Pet. 46-55) that the district court erred in denying his motion for leave to depose foreign witnesses.

Federal Rule of Criminal Procedure 15(a) authorizes the taking of depositions "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." In light of the policy favoring live testimony at criminal trials, a district court's discretion to authorize depositions "is not broad and should be exercised carefully." *United States* v. *Mann*, 590 F.2d 361, 365 (1st Cir. 1978). See also *United*

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[8] Nor is Fischer helped by *United States* v. *Jerome*, 942 F.2d 1328 (9th Cir. 1991), which he also cites (92-115 Pet. 44). In that CCE case, the government argued at trial that the defendant had organized 12 individuals, whom it identified by name. On appeal, the government conceded that the defendant was not the organizer of six of those individuals. In those unusual circumstances, the court of appeals held that the district court should have instructed the jury that it must agree unanimously as to the identity of each of the five people organized by the defendant. 942 F.2d at 1331. No such circumstances were present here.

States v. *Ismaili*, 828 F.2d 153, 159 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988); 2 Charles Alan Wright, *Federal Practice and Procedure (Criminal 2d)* § 242, at 13 (1982). The critical factors in determining whether a deposition should be authorized are the witness's unavailability and the materiality of the testimony that the witness would give. See *Ismaili*, 828 F.2d at 159. The decision to grant or deny a motion to take depositions should not be disturbed absent a clear abuse of discretion. See *United States* v. *Johnpoll*, 739 F.2d 702, 708 (2d Cir.), cert. denied, 469 U.S. 1075 (1984).

The district court did not abuse its discretion in refusing to authorize the depositions. At trial, several government witnesses who participated in the marijuana importation operation testified about Fischer's involvement in smuggling marijuana aboard the vessels in question. Gov't C.A. Br. 106. Because the government's case did not depend on Fischer's actual ownership of the vessels, the testimony of the foreign witnesses disputing such ownership would not have been significantly exculpatory. See *United States* v. *Bello*, 532 F.2d 422, 423 (5th Cir. 1976) ("Depositions indicating that Bello had legitimate business purposes for his trips would not contradict the substantial evidence that Bello was a participant in the two cocaine transactions at issue in this case."). Accordingly, this case does not present the "extraordinary circumstances" that would have warranted authorizing the depositions. As the court of appeals stated in *Ismaili*, 828 F.2d at 161-162, "if the testimony of witnesses in a criminal case could not negate the crux of the government's indictment * * *, the district court cannot be held to have abused its discretion in denying

authority to permit depositions of such witnesses under Rule 15(a)."[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorneys

OCTOBER 1992

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[9] Fischer's reliance on *United States* v. *Sindona*, 636 F.2d 792 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981), is unavailing. In that case, the court of appeals allowed the government to depose foreign witnesses over defense objection that the witnesses were not unavailable. The defendant did not dispute the importance of the testimony of the foreign witnesses, as we do here.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-177

BENJAMIN BARRY KRAMER and
RANDY THOMAS LANIER

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

ALBERT J. KRIEGER
Counsel of Record for
Petitioner Kramer
SUSAN W. VAN DUSEN
KENNETH J. KUKEC
1899 S. Bayshore Dr.
Miami, FL 33133
(305) 854-0050

ROBERT W. RITCHIE
Counsel of Record
for Petitioner
Lanier
DAVID M. ELDRIDGE
606 W. Main Ave.
Knoxville, TN 37902
(615) 637-0661

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QUESTION PRESENTED

Whether the petitioners' convictions and mandatory life sentences without parole under 21 U.S.C. Section 848(b) for acting as principal administrators, organizers, or leaders of a "continuing criminal enterprise" consisting of a series of violations of the narcotics laws violate the constitutional prohibition on ex post facto law where the instructions given to the trial jury did not require the jury to find that after the effective date of 21 U.S.C. Section 848(b), October 27, 1986, the petitioners acted as the principal administrators, organizers, or leaders over a continuing series of violations of the narcotics laws.

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IN THE

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BENJAMIN BARRY KRAMER and
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ON JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, petitioners Benjamin Barry Kramer and Randy Thomas Lanier, through their undersigned counsel, respectfully submit

this brief in reply to the arguments raised in the government's brief in opposition to the petition for certiorari.

ARGUMENT

I. The Instructions Given the Jury in this Case did not Require the Jury to Find that the Petitioners Acted as the "Principal Administrators" Over a Continuing Series of Drug Offenses After the Effective Date of 21 U.S.C. Section 848(b) in Order to Return to a Verdict of Guilty on the CCE Count in the Indictment.

In our petition for certiorari, we submitted that the instructions given to the jury in this case permitted the jury to return a verdict against the petitioners on Count 1 of the Indictment in violation of the constitutional ban on ex post facto law. We posed this argument on two levels: First, we submitted that the district court's instructions on the CCE count did not require the jury to find that the petitioners had acted as the "principal administrator, organizer, or leader" (or

"principal administrator," for short) over even a single narcotics offense after the effective date of 21 U.S.C. Section 848(b). Second, we submitted that to convict the petitioners on the CCE count, the jury was required to look to the petitioners' pre-enactment conduct to find at least one of the narcotics offenses constituting the series of offenses over which the petitioners functioned as "principal administrator." (See Petition for Certiorari at 23-31).

In its brief in opposition, the government does not endeavor to show that, on either level, the issue is not worthy of a grant of certiorari. The government does attempt to meet the first level of our argument by submitting that the jury probably understood that it had to find that the petitioners acted as supervisors over at least one narcotics felony after Section

848(b) became law, but the government's citations to the record do not support its arguments. As to the second level of our argument, the government has not responded at all.

A.

Under a plain-meaning reading, the district court's instruction permitted the jury to return a guilty verdict on the CCE count if the jury found that the petitioners had at one time functioned as "principal administrators" of a criminal enterprise, that this enterprise had continued past the effective date of Section 848(b), October 27, 1986, and that, after this date, either the petitioners had committed a single narcotics felony or "the enterprise" had grossed in excess of $10 million. Put another way, the district court's instruction did not require the jury to find that the petitioners had continued to

function as "principal administrators" after 21 U.S.C. Section 848(b) became law.

In its brief in response, the government concedes that the instructions given the jury were "ambiguous" (Brief in Response at 9), but argues nonetheless that the jury must have understood that it had to find that the petitioners continued to function as "principal administrators" after the effective date of Section 848(b).[1] In support of this argument, the government

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[1] At Page 10 of its Brief in Opposition, the government also argues, as it argued below (see Appellate Brief of the United States at 49), that the petitioners have somehow waived any argument based on the plain meaning of the jury instructions through their statements during closing argument to the jury. As we noted in the court below (see Appellant's Reply Brief at 10-11), the government has never cited a single authority for the proposition that a party's attempts to give a palliative interpretation during closing argument to a patently unconstitutional jury instruction can act as a waiver of its objections to that instruction, particularly where the party has proffered a jury instruction of its own that comports with the Constitution.

relies on citations to the closing arguments of counsel. According to the government, both prosecution and defense counsel interpreted the district court's jury instructions to require a finding that the petitioners functioned as "principal administrators" after October 27, 1986, and conveyed that understanding to the jury during closing argument. But the government's citations to the record do not support this conclusion. Instead, those record citations disclose that counsel argued that the instructions required the jury to find that the petitioners "committed acts" after the effective date of Section 848(b) (Brief in Opposition at 11 n.4 (quoting Tr. 10,379)), or that the petitioners "were involved after that period of time" (Ibid. (quoting Tr. 10, 379)), or that their "specific activities" were to be "measure[d]" after that date (Brief in

Opposition at 10 (quoting Tr. 10,230)), or that "the enterprise" (whatever that term may have meant in this context[2]) itself continued past that date. (Id. at 10 (quoting Tr. 10,115)).

It appears to be the government's position that the ex post facto clause is not offended so long as the jury understood it had to find that the petitioners did something -- anything -- after the date on which 21 U.S.C. Section 848(b) became the law of the land. This is not, however, what the ex post facto clause requires. It requires, at the very least, a finding that

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[2] As observed in our petition for certiorari, an "enterprise" is not an essential element of a Section 848(b) offense; nor is the term "enterprise" defined by the statute. (See Petition for Certiorari at 24 & n.7). Instead, the term is used as a short-hand form for the "continuing series of violations" of the narcotics laws that is the sine qua non of a CCE offense. See 21 U.S.C. Section 848(d)(2) (West 1987).

the petitioners engaged in the precise conduct for which Congress altered the legal consequences by enactment of new legislation. See Miller v. Florida, 482 U.S. 423, 430 (1987); Weaver v. Graham, 450 U.S. 24, 29, 31 (1981).

B.

The conduct that fits that description in this case concerns whether the petitioners acted as the "principal administrators" over a continuing series of drug violations. While the government has attempted to justify the decision below by showing that the jury might have understood that it had to find that the petitioners acted as "principal administrators" over one drug felony after Section 848(b)'s effective date, the government has not attempted to show that this alone would square the decision below with the requirements of the ex post facto clause, much less to challenge

the merits of a grant of certiorari on this issue.

As the straightforward statutory analysis in our petition for certiorari demonstrated, a person can be held liable under the 1986 version of Section 848(b) only if that person functioned as a "principal administrator" over a sufficient number of drug violations to constitute a "series." (See Petition for Certiorari at 19, 24, 25-26). Whether that number is two (as the Seventh Circuit stated below) or three (as every other circuit court to consider the issue has held), the jury could not have found that the petitioners functioned in this role after October 27, 1986, since, as the court below found, only one drug transaction included within the series charged occurred after that date, the so-called "San Francisco load", which took place some two weeks after Section 848(b)

became law. See United States v. Kramer, 955 U.S. 479, 482-83, 486 (7th Cir. 1992).

Since six of the seven charged drug transactions occurred before the effective date of Section 848(b), to find that the petitioners had acted as the "principal administrators" over a sufficient number of drug transactions to constitute a "series" -- the only element of a CCE offense that makes it a "continuing" offense -- the jury was forced to consider whether the petitioners played this role in at least one of the transactions occurring before Section 848(b) went into effect on October 27, 1986. Before that date, however, the role of "principal administrator" did not exist. That term was not included within the prior version of the CCE statute, and conduct that fit that description was without any independent legal significance until the 1986 version of Section 848(b)

became law. Yet the jury had to find such pre-enactment conduct by the petitioners to return a guilty verdict on the CCE count in this case. It is this change in the legal significance of the petitioners' pre-enactment conduct that makes this case truly worthy of a grant of certiorari.

C.

As the government observes in its brief, the petitioners maintained in the courts below that the enactment of 21 U.S.C. Section 848(b) on October 27, 1986, created a new substantive offense rather than a sentencing enhancement provision for an existing offense. But whether Section 848(b) is a new substantive offense or a sentencing enhancement provision, petitioners' convictions violated the ex post facto clause, since that clause requires, at a minimum, that new conduct proscribed by Congress (be it a new element

of a substantive offense or a new factor in a sentencing enhancement scheme) be proved by evidence of post effective date acts by the defendant.

What the substantive offense/sentencing enhancement distinction does bear upon is the question whether venue was laid in the Southern District of Illinois consistent with the ex post facto guarantee. The government observes that the petitioners have cited no precedent requiring that venue be established solely by an act in the district post dating the effective date of a new penal statute. It is equally true, however, that the government has cited no authority for its argument that venue may be established in a district by proof of an act that pre-dates by years the effective date of the statute

which makes that act illegal.[3] In any event, it would seem that this dearth of authority on either side, when combined with Congress's penchant for enacting new penal laws with each passing session, makes this issue particularly worthy of certiorari being granted.

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[3] The government also argues that subjecting venue requirements to ex post facto analysis would not serve the policy interests of either. (Brief in Opposition at 13). This argument appears at odds with the construction given the ex post facto clause by this Court, which has applied the clause to the abrogation of lesser included offenses, see **Kring v. Missouri**, 107 U.S. 221 (1883), to jury composition, see **Thompson, Utah**, 170 U.S. 343 (1898), and to parole requirements, see **Weaver v. Graham**, 450 U.S. 24 (1981). Furthermore, the policy behind venue provisions acknowledged by the government -- to "safeguard[] against the unfairness and hardship involved when an accused is prosecuted in a remote place" (Brief in Opposition at 13 (quoting **Platt v. Minnesota Mining & Mfg. Co.**, 376 U.S. 240, 245 (1964))) -- would appear to be implicated whenever a defendant is called to answer in a remote jurisdiction for an act done years before that particular act was proscribed by Congress.

II. The Decision Below Cannot be Reconciled with the Decision of the Second Circuit Court of Appeals in United States v. Torres, 901 F.2d 205 (2d Cir. 1990).

The Second Circuit's decision in United States v. Torres, 901 F.2d 205 (2d Cir. 1990), conflicts directly with the Seventh Circuit's decision in this case, not just on the issue whether Section 848(b) is a substantive offense as opposed to a sentencing enhancement provision, but on the question of the application of the ex post facto clause to the "principal administrator" element of an 848(b) offense as well. In its brief in opposition, the government attempts to distinguish the cases factually; but closer scrutiny reveals them to be indistinguishable.

As the government observes, Torres involved a "straddle offense," in that the defendants were accused of being the "principal administrators" over a continuing

series of drug offense during a one year period that straddled the effective date of Section 848(b). This case, too, however, was a "straddle offense," since the Indictment charged that the series of drug violations began well before Section 848(b)'s effective date and continued thereafter. Indeed, all but four months of the seven year period alleged in the Indictment (and all but one of the seven charged drug offenses) occurred before the 1986 version of Section 848(b) became law.

Here, just as in **Torres**, the district court's instructions permitted the jury to rely on both the pre-enactment and the post-enactment drug violations in determining whether the defendants had functioned as "principal administrators." If anything, the ex post facto violation is more compelling here. In **Torres**, the government established that a sufficient

number of drug offenses had occurred after Section 848(b)'s effective date to constitute a "series." United States v. Torres, 901 F.2d at 229. The only problem was that the jury was not instructed that it had to rely solely on these post-effective date drug violations in determining whether the defendant had been the "principal administrators." Id.

Here, it is uncontested that only one transaction that was part of the series alleged occurred after the effective date of Section 848(b). Consequently, the jury could find a "series" of offenses only if it considered drug violations that occurred before October 27, 1986, in determining whether the petitioners had functioned in the role proscribed by Congress as of that date, "principal administrator." In other words, a properly instructed jury would have had to have concluded that there was an

insufficient number of offenses after October 27, 1986, to satisfy that which the petitioners, as "principals," were accused of actually "administering" -- a "continuing series" of violations of the drug laws.

CONCLUSION

Based on the foregoing, the petitioners respectfully request that this Honorable Court issue a writ of certiorari to the Seventh Circuit Court of Appeals to review that court's decision in this case.

Respectfully submitted,

ALBERT J. KRIEGER, P.A.

ALBERT J. KRIEGER
Counsel of Record for
Petitioner Kramer
SUSAN W. VAN DUSEN
KENNETH J. KUKEC
1899 South Bayshore Drive
Miami, FL 33133
(305) 854-0050

RITCHIE, FELS & DILLARD, P.C.

ROBERT W. RITCHIE
Counsel of Record for
Petitioner Lanier
DAVID M. ELDRIDGE
606 W. Main Avenue
Suite 300
Knoxville, TN 37902
(615) 637-0661